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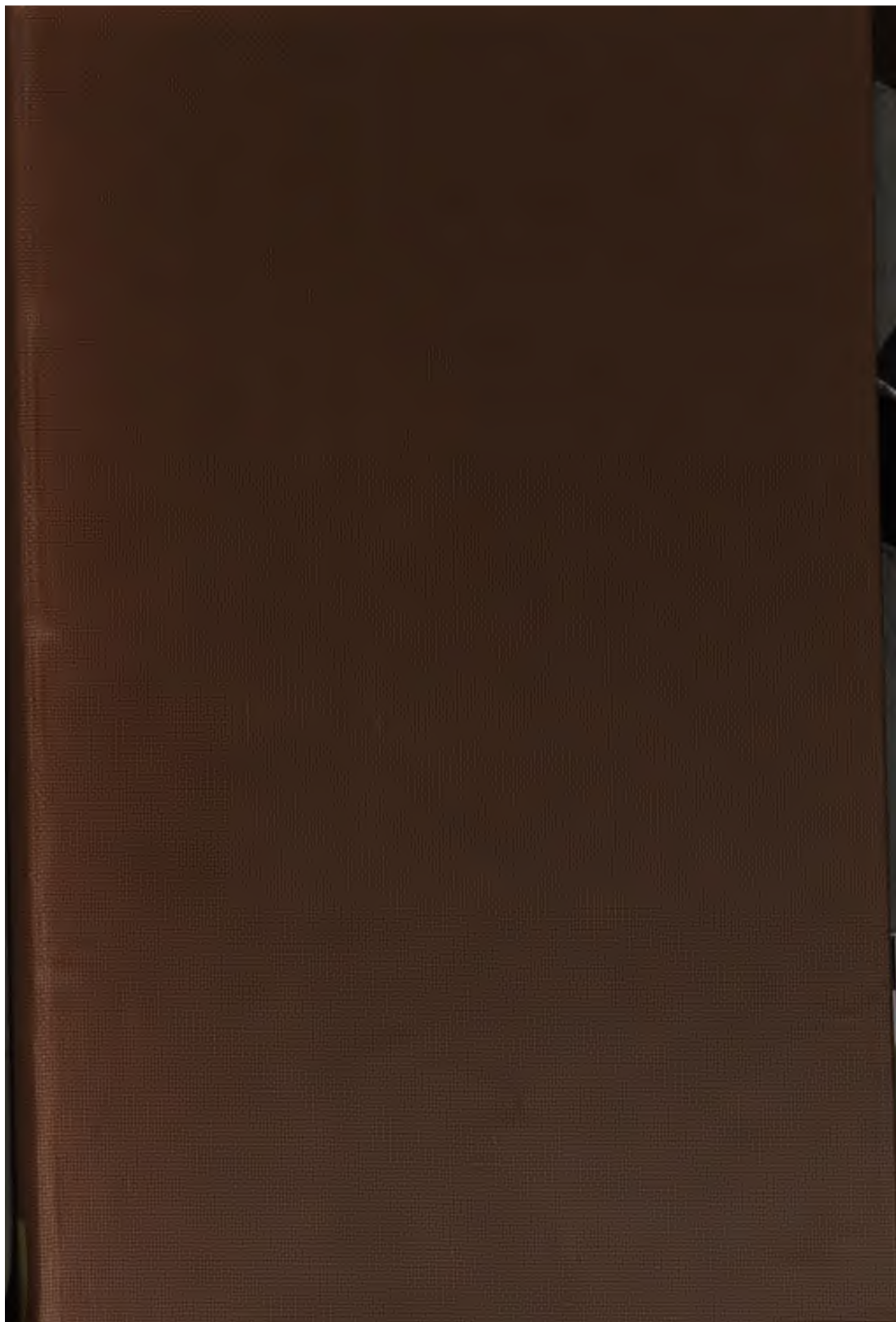
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BANKRUPTCY APPEALS.

VOL. I. PART I.

REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND

The Court of Appeal in Chancery

BY

J. P. DE GEX, H. CADMAN JONES AND R. HORTON SMITH
OF LINCOLN'S INN, ESQUIRES,
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1862—1865.



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A

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CASES

IN

BANKRUPTCY.

Ex parte SAMUEL BAGLEY RAWLINGS.

In the matter of SAMUEL BAGLEY RAWLINGS,
a Bankrupt.

1862.

Nov. 22, 24.
Dec. 6, 10.

Before The
LORDS Jus-
TICES.

THIS was a motion on the part of *Samuel Bagley Rawlings*, the bankrupt, by way of appeal from an order of Mr. Commissioner *Goulburn*, confirming an adjudication of bankruptcy against the Appellant, and to have the adjudication annulled.

A conditional assent on the part of a creditor to a deed intended to operate under the 192nd section of the Bankruptcy Act, 1861, cannot, so long as the condition remains unfulfilled, be reckoned in calculating the statutory

The petition for adjudication was filed on the 16th of *October*, 1862; the act of bankruptcy upon which it proceeded being the failure on the part of the Appellant to pay, secure or compound for a sum of *250l. 9s. 3d.*, admitted by him on the 7th of the same month, under a trader debtor summons, to be due from him to the Respondents, the petitioning creditors.

The

majority of creditors mentioned in the first of the conditions specified in that section.

Per *L. J. Knight Bruce*.—The question whether all those conditions have been complied with may be raised, notwithstanding the certificate of registration, and without setting it aside.

Per *L. J. Turner*.—The 192nd section extends to deeds of composition, although there may be no *cessio bonorum*. But the composition must be with all the creditors; and where a deed recited an agreement that sureties, parties to the deed, should pay the creditors a specified money composition to be accepted in discharge of the debts by instalments, and the delivery to the creditors, parties to the deed, of promissory notes for securing the instalments; and the creditors, parties to the deed, covenanted that the composition should be accepted in discharge of their respective debts, the amounts of which were specified in the schedule to the deed:—*Held*, per *L. J. Turner*, that the composition was not with all the creditors, there being no means afforded to non-assenting creditors of obtaining payment of the composition, or any note for securing such payment.

Per *L. J. Knight Bruce*.—Where there is only a doubt as to the validity of an adjudication, the proper course still is not to annul.

Vol. I—1.

B

D.J.S.

1862.
 Ex parte
 RAWLINGS.
 In re
 RAWLINGS.

The cause shown against the adjudication and the ground on which it was sought to annul it were, that on the 11th of *October*, 1862, the bankrupt had executed a deed, which was in the following terms:—

“This indenture, made the 11th day of *October*, 1862, between *Samuel Bagley Rawlings*, of &c. of the first part; *Martha Rawlings*, of &c. and *John Brown*, of &c. of the second part; and the several persons whose names are contained in the schedule hereunder written, and who by themselves, their partners or agents respectively, have executed these presents, being creditors of the said *Samuel Bagley Rawlings*, of the third part. Whereas the said *Samuel Bagley Rawlings* has for some time past carried on business as a maltster and corn, seed and coke merchant, at *Oakhams* aforesaid, and now stands indebted to the several persons parties hereto of the third part in the several sums of money set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full; and whereas the said *John Brown* is a large creditor of the said *Samuel Bagley Rawlings*, and it has been agreed by and between the several persons, parties to these presents, that the said *Martha Rawlings* and *John Brown* shall pay to the several creditors of the said *Samuel Bagley Rawlings* a composition of 7*s.* 6*d.* in the pound on the amount of their respective debts, which is to be accepted by them in full satisfaction and discharge of the same debts, and that such composition should be paid by three equal instalments of 2*s.* 6*d.* each at the several periods following (that is to say), the first of such instalments at the expiration of three months from the date hereof; the second of such instalments at the expiration of six months from the date hereof; and the last of such instalments at the expiration of nine months from the date hereof, and be secured by the joint and several promissory

sory notes of the said *Samuel Bagley Rawlings, Martha Rawlings, and John Brown*; and whereas the said promissory notes have been respectively delivered to the several creditors of the said *Samuel Bagley Rawlings*, parties hereto of the third part, at the time of the execution of these presents by the said creditors respectively, as they the said creditors do hereby severally acknowledge and declare; and whereas, in order to enable the said *Martha Rawlings and John Brown* to meet the said promissory notes, it has been agreed by and between the several parties hereto, that all the stock in trade, moneys, trade effects, and all other the estate and effects whatsoever of the said *Samuel Bagley Rawlings* shall be assigned unto the said *Martha Rawlings and John Brown* in manner hereinafter expressed: Now this indenture witnesseth, that in pursuance of the said agreement and for effectuating the same, and in consideration of the premises and of 10s. sterling to the said *Samuel Bagley Rawlings* now paid by the said *Martha Rawlings and John Brown*, the receipt whereof is hereby acknowledged, he the said *Samuel Bagley Rawlings*, with the full consent and approbation of the said creditors (testified by their severally executing these presents), doth hereby bargain, sell, assign, transfer and set over, and the said creditors do hereby severally so far as they may or can ratify and confirm, unto the said *Martha Rawlings and John Brown*, their executors, administrators or assigns, all the stock in trade, money, credits, securities, goods, merchandise, books, books of account, and all other the estate and effects whatsoever and wheresoever of or belonging to his said trade or business, and all other the estate and effects of the said *Samuel Bagley Rawlings* whatsoever (the wearing apparel of himself only excepted), and all the title, interest, possession, claim and demand whatsoever and howsoever of the said *Samuel Bagley Rawlings* therein and thereto,

1862.
Ex parte
RAWLINGS.
In re
RAWLINGS.

1862.
Ex parte
RAWLINGS.
In re
RAWLINGS.

to have, hold, receive and take the said estate and effects and premises hereinbefore assigned or intended so to be unto and by the said *Martha Rawlings* and *John Brown*, their executors, administrators and assigns. And the said *Samuel Bagley Rawlings* doth hereby constitute and appoint the said *Martha Rawlings* and *John Brown*, their executors, administrators and assigns, the true and lawful attorneys, irrevocable, of him the said *Samuel Bagley Rawlings*, his executors and administrators, to ask, demand, sue for, recover and receive the debts, moneys and premises hereby assigned or intended so to be, and on payment or delivery thereof, or of any part thereof respectively, in the name of the said *Samuel Bagley Rawlings*, his executors or administrators, to give good and effectual receipts and discharges for the same; and also in his or their name to adjust or settle all accounts and transactions whatsoever relating to the said hereby assigned premises, as fully and effectually to all intents and purposes as he the said *Samuel Bagley Rawlings*, his executors or administrators could have done if these presents had not been executed. And in consideration of the premises, they the said creditors parties hereto of the third part, do hereby for themselves severally and respectively, and for their several and respective heirs, executors and administrators, covenant and agree to and with the said *Martha Rawlings* and *John Brown*, their executors and administrators, and also separately with the said *Samuel Bagley Rawlings*, his executors and administrators, that the said composition so agreed to and secured as aforesaid shall be, and the same is hereby taken and accepted by them, the said creditors respectively, in full satisfaction and discharge of their several and respective debts and demands against the said *Samuel Bagley Rawlings*, the full amount of which said debts and demands are set opposite to the respective names of the said creditors executing these presents

presents in the schedule hereunder written. And the said *Samuel Bagley Rawlings* doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said *Martha Rawlings* and *John Brown*, their executors and administrators, that he the said *Samuel Bagley Rawlings*, his executors or administrators, will at the request and expense of the said *Martha Rawlings* and *John Brown*, their executors or administrators, do and execute all such further acts and deeds as may be necessary for better or more satisfactorily assigning or otherwise assuring the effects and premises hereby assigned unto the said *Martha Rawlings* and *John Brown*, their executors, administrators and assigns, according to the true intent and meaning of these presents, as by the said *Martha Rawlings* and *John Brown*, their executors, administrators or assigns shall be reasonably required. Provided always, and it is hereby declared, that any creditor who has any bill or bills of exchange or other security, for the payment whereof the said *Samuel Bagley Rawlings* and any other person or persons is or are liable, either as drawer, acceptor or indorsee, may execute these presents without prejudice to his claim against any other person or persons liable thereto in like manner as under an adjudication in bankruptcy. In witness" &c.

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None of the Appellant's creditors actually executed this deed, it being executed only by himself and the parties of the second part. The latter did not take possession of any of the property comprised in it, of which the Appellant could have given or ordered possession.

According to the account of debts delivered together with the deed to the Chief Registrar in obedience to the General Orders in Bankruptcy of the 22nd of *May*,
 1862,

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1862 (a), it appeared that the total number of creditors was

(a) The material sections of the Acts of 1849 and 1861 and other matters, to which the arguments in the present and several of the following cases had reference, are as follows:—

Bankrupt Law Consolidation Act, 1849, ss. 224, *sqq.*

“And with respect to arrangements by deed, be it enacted,

“CCXXIV. That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to ten pounds and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available

securities or liens from such trader, shall appear to be the balance due to him.

“CCXXV. That no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby.

“CCXXVI. That when the trustee or inspector under any such deed or memorandum of arrangement, or, if there shall be no such trustee or inspector, when any two of the creditors, shall be satisfied that six-sevenths in num-

was twenty-six, of whom sixteen assented, and ten did not;

ber and value of the creditors whose debts amount to ten pounds and upwards have signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the court in writing, and such certificate shall be filed with the registrar of the Court, and shall thereupon be *prima facie* evidence in all Courts of law and equity that such deed or memorandum of arrangement has been so signed.

“CCXXVII. That every such certificate as last aforesaid shall have appended thereto a full account of the debts of such trader, together with the names, residences, and occupations of his creditors, and shall be accompanied by an affidavit by such trader verifying the same; and any omission in such account or the insertion therein of any debt not really existing, or of any larger amount of debt than that really existing, and which shall appear to the court to have been made through the culpable negligence or fraud of such trader, with intent to defraud any of his creditors, shall deprive him of the benefit of the provisions of this act with respect to arrangements by deed, and of the discharge proposed in any such deed or memorandum of arrangement: provided always, that any omission, insertion or incorrectness in such account which shall not have been made through such

culpable negligence or fraud as aforesaid, shall not defeat or otherwise affect such deed or memorandum of arrangement.

“CCXXVIII. That the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed, in like manner as in bankruptcy; and no creditor shall be prejudiced or affected by being a party to any such deed or memorandum of arrangement as aforesaid, or by the same being obligatory upon him as to his right or remedy against any person other than such trader; and every person who would be entitled to prove in bankruptcy shall be deemed a creditor within the meaning of the provisions of this act with respect to arrangements by deed.

“CCXXIX. That if any creditor of any trader shall be desirous to show that the administration of the estate of such trader has not been duly conducted in conformity with such deed or memorandum of arrangement, it shall be lawful for him to apply to the Court by petition, supported by affidavit, stating any facts or circumstances to show that such administration has not been duly conducted, and thereupon the court shall have full power and it is hereby fully authorized to consider the subject matter of such application, and if it shall think fit may direct any inquiry, and in such manner as it shall

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not; that the total amount of debts was 4,949*l.* 5*s.* 2*d.*,
 three-fourths

think proper, into the subject of such application, and generally may make such order and exercise such jurisdiction in or over the subject matter of such application and the costs thereof as to the said court shall appear just."

The Bankruptcy Act, 1861, ss. 192, *sqq.* are as follows:—

"As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor.

"192. Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor, as if they were parties to and had duly executed the same, provided the following conditions be observed: that is to say—

"1. A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument:

"2. If a trustee or trustees be appointed by such deed or

instrument, such trustee or trustees shall execute the same:

"3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor:

"4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered:

"5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor whose debts amount to ten pounds or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed:

"6. Such deed or instrument shall, before registration, bear such ordinary and *ad valorem* stamp duties as are hereinafter provided:

"7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees.

three-fourths of which amount was 3,711*l.* 18*s.* 10½*d.*;
and

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"193. The date, names and descriptions of the parties to every such deed or instrument, not including the creditors, together with a short statement of the nature and effect thereof, shall be entered by the chief registrar in a book to be kept exclusively for the purposes of such registration. Such entry shall be made within forty-eight hours after the deed shall have been left with the registrar as aforesaid, and a copy of such entry shall be published in the *London Gazette* within four days after the making of such entry.

"194. Every deed, instrument or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence.

"195. No deed or instrument whatever required to be registered as aforesaid shall be registered

unless, in addition to the ordinary stamp duty, it also be impressed with or have affixed to it a stamp denoting a duty computed at the rate of five shillings upon every hundred pounds, or fraction of an hundred pounds, of the sworn or certified value of the estate or effects comprised in, or to be collected or distributed under, such deed or instrument: Provided, that the maximum of *ad valorem* duty payable in respect of any such deed or instrument shall be two hundred pounds.

"196. Every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the chief registrar for registration.

"197. From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees

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and that the aggregate value of the debts of the sixteen assenting creditors was 4,304*l.* 12*s.* 2*d.*

Among

of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate and effects in bankruptcy; and except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorised to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy.

“198. After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant without leave of the court; and a certificate of the filing and registration of such deed under

the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy.

“199. In case any petition shall be presented for an adjudication in bankruptcy against a debtor after his execution of such deed or instrument as is hereinbefore described, and pending the time allowed for the registration of such deed or instrument, all proceedings under such petition may be stayed, if the court shall think fit; and in case such deed or instrument shall be duly registered as aforesaid, the petition shall be dismissed.

“200. If a debtor cannot obtain the assent of a majority in number representing three-fourths in value of his creditors, by reason of his being unable to ascertain by whom bills of exchange, promissory notes, or other negotiable securities accepted, drawn, made or endorsed by him are holden, or by reason of the absence of creditors in a foreign country, or other similar circumstances, it shall be sufficient if he obtain the consent of a majority in number representing three-fourths in value of all his other creditors to such deed or instrument as aforesaid; provided that notice shall have been inserted by or on behalf of the debtor in one or more newspapers published in the county or place at which he shall have carried on business immediately

Among the assenting creditors, however, were placed the names of Messrs. *Eaton, Cayley & Co.*, bankers of *Stamford*, as unsecured creditors for 1,400*l.*, with the following note appended:—"They hold the bond of Mrs. *Rawlings* for 200*l.*, and of Mr. *Bennett* for 500*l.* and a policy for 1,000*l.* on my life, but claim to be entitled to the composition upon the whole debt."

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The

prior to the date of such deed or instrument, requiring his creditors to signify their assent to or dissent from such deed or instrument by notice in writing addressed to the trustee or trustees thereof within fourteen days from the insertion of such notice, and that the affidavit or certificate of the trustee or trustees shall state the circumstances of the case, and the same shall be allowed by the Court, and provided the deed or instrument be in such form as is expressed in schedule (D.) to this act annexed, which shall vest all the estate and effects of the debtor in the trustees of such deed, and provided that all such other conditions as are hereinbefore required be duly complied with."

The scheduled form referred to in the last of these sections is the following:—

"This deed made the — day of — between A. B. [the debtor] and C. D. and E. F. [the trustees] on behalf and with the assent of the undersigned creditors of A. B., witnesseth that A. B. hereby conveys all his estate and effects to C. D. and E. F. absolutely, to be applied and administered for the benefit of the creditors of A. B. in like manner as if A. B.

had been at the date hereof duly adjudged bankrupt. In witness &c.

"Schedule of creditors."

The General Order of the 22nd of May, 1862, referred to in the text and during the arguments of the present and several of the subsequent cases, is, so far as it is material, with the schedule appended to it, as follows:—

"1. Together with every deed or instrument left, after the fifth day of June next, at the office of the chief registrar, for the purpose of being registered under sect. 192 of the Bankruptcy Act, 1861, and in addition to the affidavit or certificate required to be delivered to the chief registrar under the 5th condition of the said section, there shall be delivered to the chief registrar a copy of such deed or instrument, certified by the attorney or solicitor attesting the execution of the same by the debtor, to be a true copy, and also, and as near as may be, in the form in the schedule hereunder written, a full account of the debts of the debtor, which shall respectively amount to 10*l.* and upwards, together with the names, in alphabetical order, and the residences of his creditors, distinguishing

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The deed accompanied by this account of debts and also by an affidavit of the Appellant, sworn on the 11th of *October*, 1862, that a majority in number representing three-fourths in value of his creditors whose debts amounted to 10*l.* or upwards, had in writing assented to or approved of the deed, and otherwise in accordance

those who have, in writing, as- panied with an affidavit by such
 sented to or approved of the deed, debtor verifying the same."
 and such account shall be accom-

"SCHEDULE.

"THE BANKRUPTCY ACT, 1861.

"Form of the Account to be delivered to the Chief Registrar with Trust Deed, Composition or Inspectorship Deed. Sect. 192.

* In cases of partnership all the debts of the partnership and the separate debts of each partner are to be given in separate lists.

"N.B.—This is to be an account to the best of the debtor's knowledge, information, and belief, of all the debts of the debtor* which shall respectively amount to 10*l.* and upwards, and including debts secured and showing the estimated value of any security.

"A full account of the debts of amounting to 10*l.* and upwards, together with the names and residences of his creditors, to the best of his knowledge, information, and belief.

No.	Names and Residences.	If Assenting.	Secured.		Unsecured.	Nature of Security.
			Amount.	Value or estimated Value of the Security to be deducted.	Amount.	
1	Anderson, John, 5, Fore Street, London, Brush Maker,	Assenting	1200 0 0	450 0 0	750 0 0	Mortgage dated 1st July, 1861, of two freehold houses at Hen- don, for secur- ing 600 <i>l.</i> —The estimated value is the Security of 450 <i>l.</i>
2	Hopkinson, Joseph, 65, Cornhill, London, Jeweller,	—	—	—	360 0 0	
3	Watson, Henry, 45, Strand, London, Grocer.	Assenting	—	—	200 0 0	

No. of Creditors ... 36
 Assenting ... 30
 Not Assenting 16 36

Amount of Debts $\frac{1}{2}$ £24,000
 6,000
 3
 £18,000

Amount of Debts of Creditors Assenting £21,300

accordance with the requirements of the fifth of the conditions specified in the 192nd section of the Bankruptcy Act, 1861, was delivered to the Chief Registrar, and the deed was registered on the 13th of *October*, 1862, and a certificate of registration delivered to the Appellant.

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The Commissioner thought the 198th section of the Bankruptcy Act, 1861 had no application to this state of circumstances, and afforded no bar to the proceedings in bankruptcy, and from this decision the Appellant, having been adjudged bankrupt, appealed.

Mr. *Bacon* and Mr. *Ernest Reed* for the Appellant.

The certificate of registration of the deed is conclusive evidence that the formalities required by the statute in order to render it binding upon all the Appellant's creditors have been fulfilled. The question, therefore, is whether or not this is such a deed as is within the meaning of the 192nd and following sections of the Bankruptcy Act, 1861, and we submit that it is. The only cases in which there has been any discussion of the enactment contained in these sections, so far as the essentials of a deed intended to operate under them are concerned, are those of *Walter v. Adcock* (a), and *In re Castleton* (b). In the former of those cases, some of the learned Barons of the Exchequer seem to have considered themselves at liberty to speculate upon the intentions, rather than bound to interpret the language, of the legislature, and in a position to adjudicate upon the general requisites to the validity of deeds intended to operate under the sections in question, rather than called upon to express an opinion upon the terms of the particular deed before them. And in respect of that case, we submit that the opinion of Mr. Baron *Wilde* is more correct

(a) 7 H. & N. 541.

(b) 31 L. J., N. S. Bank. 71.

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correct than those of the Lord Chief Baron and Mr. Baron *Martin*. *In re Castleton* seems to show that your Lordships, when that case was argued, entertained the same view. With the exception of these two cases, the question may be said to be really unaffected by authority, and must be discussed on general principles; and the plain language of the legislature, when so dealt with, clearly admits within its scope composition deeds, providing for the release of a debtor upon the payment of a composition upon his debts.

The words "and the distribution, inspection, conduct, management and mode of winding-up of his estate," contained in the now repealed 224th section of the Bankrupt Law Consolidation Act, 1849, were made the ground-work of a decision of the Court of Exchequer Chamber in *Tetley v. Taylor (a)*, subsequently followed in *Ex parte Wilkes (b)* and other cases, that a deed to be a valid deed of arrangement under that section, and as such binding upon non-assenting creditors, ought to provide for the absolute distribution of all the debtor's property in all events amongst all his creditors as in bankruptcy. But the language of the 192nd section of the Act of 1861 affords no similar ground-work, and indeed expressly excludes the possibility of its existence, by the change advisedly made (during the passage of the bill into law) of the words just cited from the 224th section of the Act of 1849 into the words "or the distribution, inspection, management and winding-up of his estate" in the 192nd section of the Act of 1861.

Even therefore were it admissible, as we submit it is not, to look to the repealed sections of the Act of 1849 for an analogy to guide us in construing the enactment
contained

(a) 1 *Ell. & Bl.* 532.

S. C., De G., M. & G., Bcy.

(b) 5 *De G., M. & G.* 418; *App.* 458.

contained in the Act of 1861, the decisions based upon the language of the former act would have no application to cases arising under the new statute. Indeed, the provisions of the Act of 1849, as construed by judicial interpretation, excluded composition deeds from their scope, and so frustrated the objects for which they were introduced; and it was the policy of the legislation of 1861 in this respect to repair the consequences of the interpretation judicially placed upon the former enactment. The whole scope of the later act is to enlarge the powers of creditors, and to extend the range of the clauses relating to amicable arrangements between them and their debtors; as clearly appears, for example, from a comparison of the limited provision for change from bankruptcy to arrangement afforded by the 230th section of the Bankrupt Law Consolidation Act, 1849 (*a*), with the

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(*a*) Which with its heading and auxiliary section 231 is as follows:—

“ And with respect to composition after adjudication of bankruptcy, be it enacted,

“ CCXXX. That any bankrupt at any time after he shall have passed his last examination may call a meeting of his creditors (whereof and of the purport whereof twenty-one days' notice shall be given in the *London Gazette*), and if the bankrupt or his friends shall make an offer of composition, and nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as

aforesaid, and if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the Court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the Court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the fiat or petition for adjudication, and every creditor of such bankrupt shall be bound to accept of such composition so agreed to.

“ CCXXXI. That in deciding upon the offer of composition no creditor whose debt is below twenty pounds shall be reckoned in number, but the debt due to such creditor shall be computed in value; and every creditor to the amount of fifty pounds and

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the two-fold and liberal enactments for the same purpose contained in the 110th and the 185th and following sections

upwards residing out of *England* shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called so long before such meeting as that he may have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney, executed and attested in manner required for a creditor's voting in the choice of assignees; and if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition; and the bankrupt shall (if thereto required) make oath before the Court that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent."

By the 109th and 110th sections of the Bankruptcy Act, 1861, it is enacted as follows:—

"109. As soon as conveniently may be after adjudication shall have become absolute, the Court shall appoint a meeting of the creditors, of which ten days' notice shall be given in the *London Gazette*, and which meeting shall be held at such time and place as the Court shall appoint . . .

"110. In case at such meeting

or at any other meeting of creditors any proposal shall be made by or on behalf of the bankrupt which it shall appear to the major part in value of the creditors then present ought to be accepted, or if it shall appear to the majority in value of the creditors present at any meeting to be desirable on any ground to resolve, and such majority shall resolve, that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days, in order that notice of such resolution may be given to every creditor by the official or creditors' assignee, which shall be done accordingly; and if at such adjourned meeting a majority in number representing three-fourths in value of the creditors present shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered in such manner as such majority shall direct, and the bankrupt having made a full discovery of his estate shall be entitled to apply for an order of discharge."

The 185th and following sections of the Act of 1861 with their headings are respectively as follows:—

"As to change from bankruptcy to arrangement:

"185. At the first meeting of creditors held after adjudication in manner herein provided, or at any meeting to be called for the

tions of the Act of 1861; or again from a comparison of the restricted descriptions for the validity of deeds of arrangement

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purpose, and of which ten days' notice shall have been given in the *London Gazette*, three-fourths in number and value of the creditors present or represented at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, composition, or otherwise, and that an application shall be made to the Court to stay proceedings in the bankruptcy for such period as the Court shall think fit.

"186. The registrar shall report such resolution to the Court within four days from the date of such resolution; and the bankrupt, or any creditor nominated in that behalf by the meeting, may then apply to the Court that the proceedings in bankruptcy may be stayed in the terms of such resolution; and the Court, after hearing the bankrupt, and such creditors as may desire to be heard for or against the resolution, and if it shall find that the resolution was duly carried, and that its terms are reasonable, and calculated to benefit the general body of the creditors under the estate, shall confirm the same, and make order accordingly, and in such order shall give such directions as to the interim management of the estate as it shall deem expedient.

"187. If the proceedings in bankruptcy be stayed as herein provided, the bankrupt, or any creditor nominated in that behalf by the meeting aforesaid, may, at

any time within the period during which the proceedings are so stayed, produce to the Court a deed of arrangement, signed by or on behalf of three-fourths in number and value of all the creditors of the bankrupt; and the Court may consider the same, and may examine on oath the bankrupt and any of the creditors who may desire to be heard in support of or in opposition to the deed, and may make such other inquiry as it may think necessary; and if the Court shall be satisfied that the deed has been duly entered into and executed, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall by order make a declaration of the complete execution of the deed, and shall direct the same to be registered with the chief registrar, and shall also, if it thinks fit, annul the bankruptcy; and such deed shall thereafter be as binding in all respects on any creditor who has not executed the deed as if he had executed it, provided such deed be registered with the chief registrar in manner directed by the order.

"188. Either before or after such order, the Court shall have jurisdiction to entertain any application of the bankrupt, or of any party to the deed, or of any creditor or person claiming to be a creditor, respecting the disclosure, distribution, inspection, conduct,

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arrangement which alone were held to be effectual under the 224th section of the former act, with the wider scope allowed by the terms of the 192nd and following sections of the

management, or winding-up of the bankrupt's estate and affairs, or any act or thing relating thereto, or respecting the execution of any of the trusts or provisions of the deed, or the audit or examination of the accounts of a trustee or inspector, or the taxation or examination of the costs or charges of any attorney, solicitor, accountant, auctioneer, broker, or other person acting or employed under the deed, or generally for the decision of any dispute or question, and shall also have jurisdiction to entertain any application of any such person as aforesaid, respecting any matter for the submission whereof to the Court provision is made by the deed, or any matter arising between any of the said persons, and any other person appearing and submitting to the jurisdiction of the Court; and the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and on entertaining any such application shall have power to make all such orders as shall seem just, and to enforce all such orders as in bankruptcy.

"189. The Court shall have power, for the purpose of any application under these provisions, or for the better execution of any powers given to the Court thereby, to summon, and to examine, upon oath or otherwise, the bankrupt, and any party to the deed, and

any creditor or person claiming to be a creditor, and any person known or suspected to have any of the estate in his possession, or any person supposed to be indebted to the estate, or whom the Court may deem capable of giving any information material to the full disclosure of the debtor's transactions and affairs, or to the carrying into effect the provisions of the deed; and the Court may exercise, as to the examination of such persons, and the production by them of such books, papers, deeds or documents as it shall deem requisite, the same powers that are vested in the Court with relation to the examination of persons and witnesses, and the production of books, papers, deeds and documents, in matters of bankruptcy.

"190. If the resolution aforesaid shall not be duly reported, or if the Court shall refuse the application to stay proceedings, or if the deed of arrangement shall not be duly produced, or if upon its production the Court shall not think fit to approve thereof, the bankruptcy shall proceed as though no such resolution had been passed; and the Court may make all necessary orders for resuming the proceedings in bankruptcy, and the period of time which shall have elapsed between the date of such resolution and the date of the order for resuming proceedings shall not be reckoned

the Act of 1861. Such then being the policy governing the introduction of the 192nd and following sections of the last-mentioned act, does their language or not carry into effect the presumable objects of its framers? We submit that it does. The heading which is prefixed to these sections as contrasted with that prefixed to the 224th and following sections of the Act of 1849, clearly includes within its ambit deeds providing for the release of debtors upon the payment of a money composition under which they retain possession of their property, equally with trust deeds which contemplate a cession of property to trustees for the benefit of the debtors' creditors, and with inspectorship deeds under which, as in the case of composition deeds, the debtors retain the control of their property, although subject to inspection. The guarded language of the second and seventh conditions specified in the 192nd section shows, as do also the words "every deed" in that section itself, referring as they clearly do to every deed of either of the classes mentioned in the preceding heading, that the legislature in passing this enactment had it in contemplation to extend its benefits to deeds which should not affect property belonging to debtors, as indeed might have been expected to be done in an act which fuses the proceedings in insolvency with those in bankruptcy, and therefore brings within its provisions (as by its 98th and 99th sections) debtors who have no property. Even the language of the 194th section shows that the legislature contemplated the existence of cases in which the whole of the debtor's property might not be dealt with. The deed in
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in calculating periods of time prescribed by this act.

"11. If the bankruptcy be annulled, as herein provided, the

order annulling the same shall be filed with the proceedings, and notice thereof shall be given in the *London Gazette*."

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the present case is not nor was meant to be a trust deed. There is no trust created, no trustee, no assignment. To it consequently such of the conditions specified in the 192nd section as point to deeds which deal with the debtor's property, and among them the 7th condition, are inapplicable. But as a composition deed of the nature contemplated by the act, we submit that it is valid by virtue of the act, and binding upon all the Appellant's creditors.

[*The Lord Justice Knight Bruce*: Would the course of proceeding which in the case of *Ex parte Bower (a)* was held to be right under the Act of 1849, be wrong under the Act of 1861 ?]

Mr. Bacon. Such a course of proceeding would be impracticable here, as the composition deed could not be set up at law against the title of assignees under the adjudication.

They also referred to *Re Shettle (b)*, before Mr. Commissioner *Holroyd*.

Mr. Giffard and *Mr. Clement Swanston* for the Respondents.

It was not competent for the Appellant, having admitted the Respondents' demand under the 79th and 81st sections of the Act of 1849, to take advantage within the seven days mentioned in the 81st section of the provisions contained in the 192nd and following sections of the act of 1861 against the Respondents. The principles which guided this Court in the cases of

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(a) 1 *De G., M. & G.* 468, *Burnett*, 4 *De G. & S.* 54.
 475; *S. C.*, *De G., M. & G.* (b) 11 *W. R.* 45.
Bcy. App. 68. See also *Ex parte*

Ex parte Walker (a) and *Ex parte Dales* (b) are applicable to the present case. Moreover, the proceedings initiated by the Respondents are attempted to be stayed by the execution of this deed, with, as it is alleged, the due fulfilment of all the conditions imposed by the statute. The onus is upon the Appellant of affirmatively proving this allegation; and to produce simply the certificate of registration, and his own affidavit upon which that certificate was founded, is not enough. The assents of the creditors who are alleged in that affidavit to have in writing assented to or approved of the deed should be produced.

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[*The LORD JUSTICE KNIGHT BRUCE*: Speaking only for myself, I think that you are entitled to have the assents produced, or their absence accounted for.]

[Upon this intimation of opinion of the Lord Justice, the assents were produced on the part of the Appellant. It appeared thereby that, with respect to the assent of Messrs. *Eaton, Cayley & Co.*, those creditors on the 27th of *October*, 1862, gave through their solicitors, Messrs. *Thompson & Phillips*, merely an assent conditional upon the creditors being unanimous, which was exchanged, but not until the 30th of *October*, 1862, for an unconditional assent; and that, consequently, the affidavit of the debtor made on the 11th of that month was incorrect, in so far as it referred to Messrs. *Eaton, Cayley & Co.* as assenting creditors at that time; and that although the unconditional assent of these creditors was obtained before the expiration of the twenty-eight days mentioned in the fourth condition specified in the 192nd section, such assent was not obtained within the forty-eight hours mentioned in the 193rd section.]

The

(a) 6 *De G., M. & G.*, 752; (b) 2 *De G. & J.* 206; *S. C.*,
S. C., *De G., M. & G.*, *Bcy.* *De G. & J.*, *Bcy.* *App.* 152.
App. 532.

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The certificate of registration, then, it appears was given, although the registrar was powerless to do otherwise than give it, on a false assumption of facts, which the production of these assents makes clear; and we are entitled to remove the names and debt of Messrs. *Eaton, Cayley & Co.* from the list of assenting creditors. [The LORD JUSTICE TURNER: Must you not apply to discharge the registration?] We submit not; the act gives effect to the deed, subject to the performance of the conditions imposed; and it is incumbent on the Appellant moving here to stay proceedings in bankruptcy to support his case by all proper affirmative evidence. Removing, then, these names and this debt, we have a majority of fifteen assenting to ten non-assenting creditors, and representing in value the sum of 2,904*l.* 12*s.* 2*d.* only, less than the majority in value required by the statute. But even if we are not entitled to production of the assents, and the certificate of registration is to be assumed to be conclusive so long as the registration itself remains unimpeached, still the assent must be reckoned as extending only to the balance of the amount due to these creditors, after deduction of the value of the securities held by them. This is clear from the form of the schedule to the order of the 22nd of May, 1862, which order being made under the authority of the 45th and 47th sections of the Act of 1861 (*a*), must have

(*a*) The schedule to the order referred to is set out above, p. 12, note. The sections of the act referred to are respectively as follows:—

“45. The Lord Chancellor shall, with the assistance of two commissioners, and subject to the provisions of this act, frame general orders for the following purposes:

“For regulating the practice and procedure of the Courts of Bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in the said Courts, in all matters under this act;

“For regulating the duties of the various officers of such Courts;

“For regulating the fees payable and the charges and costs to

have due weight attributed to it in construing the act itself. This appears also from the 97th section of the act (a). That section applies, it is true, in strictness only to the computation of debts for the purposes of petitions under the act; but the legislature must have intended a similar course of procedure to be followed in cases of arrangements by deed, the object of which was to provide for an administration as in bankruptcy, but without the necessity of actual resort to the Court of Bankruptcy; and that no creditor should come in under a deed of arrangement who could not also come in under a bankruptcy. The statutory form of deed too given in the schedule (D) to the act clearly recognises the principle that the administration must be in all respects as in bankruptcy. It follows, therefore, that creditors coming in under a deed must come in only for such part of their debts as would be proveable in the case of an actual bankruptcy, that is, for the whole amount minus the value of securities held by them. Now, it appears that Messrs. *Eaton, Cayley & Co.* are creditors

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be allowed with respect to all proceedings before such Courts, and before the County Courts acting in bankruptcy;

"For regulating the practice and procedure upon appeals;

"For regulating the filing, custody, and inspection of records;

"And, generally, for carrying the provisions of this act into effect.

"47. After such general orders shall have been so framed they or any of them may be rescinded or varied, and other general orders may be framed in manner aforesaid. . . ."

(a) Which enacts as follows:—

"97. In the computation of debts for the purposes of any

petition under this act there shall be reckoned as debts,—

"1. Sums due to creditors holding mortgages or other available securities or liens; after deducting the value of the property comprised in such mortgages, securities, or liens:

"2. Such interest and costs as shall be due in respect of any of the debts:

"But there shall not be reckoned,—

"1. The amount of the debts in respect of which the petitioner has already taken the benefit of insolvency, protection, or bankruptcy:

"2. Debts barred by any statute of limitations."

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creditors for 1,400*l.* and hold securities amounting in the aggregate to 1,700*l.* Even therefore if they are to be retained amongst the assenting creditors in point of number, the amount of their debt must be entirely removed from the computation of the amount in value of the debts of assenting creditors, and the statutory majority is not made up.

On any of these grounds, therefore, the appeal must fail. We submit, however, that it must fail equally on general grounds. It would be strange if a deed such as this should be held within the protection of the 192nd and following sections of the Bankruptcy Act, 1861. It is a deed which not only is expressed to be made with and for the benefit of those creditors only who have executed it (a thing which no creditor has in fact done), but which, by its form and by the effect of its recitals, showing the relative positions of *John Brown* and the Appellant, and the object of the assignment made by the deed to *Martha Rawlings* and *John Brown*, creates an irrevocable trust in those persons of the property assigned to them for the benefit of the Appellant's creditors. The omission, therefore, on the part of *Martha Rawlings* and *John Brown* to take possession of the property comprised in the deed, is in contravention of the seventh condition of the 192nd section, and the deed consequently out of the protection of the statute, and no bar to the proceedings taken in bankruptcy by the Respondents, to whom indeed promissory notes of the nature contemplated by the deed have never been either given or tendered. It is urged however on the other side that this is not, nor was meant to be, a trust deed, but that under the 192nd and following clauses of the Act of 1861 a composition deed will, upon the fulfilment of the statutory conditions, be binding upon non-assenting creditors equally with those who have assented, and that

that this deed is one within the scope of these sections. But we submit that the policy of the Act of 1861 has been to increase, rather than to relax, with respect to deeds intended to operate under the 192nd and following sections, the stringency of the requisites to deeds of arrangement under the Act of 1849, as established by the decisions of the Exchequer Chamber in *Tetley v. Taylor* (a), of this Court in *Ex parte Wilkes* (b), and of the Court of Exchequer in *Irving v. Gray* (c), and recognised by the House of Lords in *Larpent v. Bibby* (d), and which must be supposed to have been present to the mind of the legislature when engaged in passing the Act of 1861. Whilst under the former act the most general kind of deed was contemplated, and one safeguard alone was added, viz., the execution by six-sevenths in number and value of the creditors, the new act, in language substantially the same, contemplates deeds not more general in intrinsic character, *Walter v. Adcock* (e), and requires compliance with seven conditions instead of one. The change of the conjunctive "and" into the disjunctive "or" is relied upon as evidencing an altered intention of the legislature. Had however such an alteration been intended, express language would have been used, and a change of principle so fundamental would not have been left to be inferred from a change of language so small. [The LORD JUSTICE KNIGHT BRUCE: According to the words of the present enactment, would not a gratuitous release be within it?] It would, if the construction contended for on the other side is the right one, and this would be so unreasonable a consequence as to forbid such an interpretation. The heading prefixed to these sections, upon which stress has been laid, simply introduces that por-

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| (a) 1 Ell. & Bl. 532. | (c) 3 H. & N. 34. |
| (b) 5 De G., M. & G. 418; | (d) 5 H. L. Cas. 481. |
| S. C., De G., M. & G. Bcy. App. | (e) 7 H. & N. 541. |

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tion of the act in which the legislature has gathered together its enactments relative to all kinds of deeds of arrangement, so that, although it may be true that the 192nd section refers to different kinds of deeds, among which the second condition specified in the section contemplates the possibility of there being some in which there is no intervention of trustees, this merely shows what the cases of *Ex parte Wilkes* (a), *Irving v. Gray* (b) and *Ex parte Calvert* (d) showed with respect to deeds of arrangement under the former act, viz., that inspectorship deeds, in which as a rule there is no intervention of trustees properly so called, are within the scope of the present act. The fifth condition applies to cases where there are trustees, and cannot be read as if the words "if any" followed the words "by the trustee or trustees." The 194th section, larger in its terms, and not meant as a mere idle repetition of the 192nd, is merely a fiscal provision, and includes *all* the deeds mentioned in the heading, including therefore deeds operating under the 192nd section amongst others. It shows, however, that the legislature did not contemplate an entire absence of the debtor's property from the operation of these deeds, and the 197th section clearly contemplates an administration of property. But even if the policy of the new enactment be thought to differ from that of the Act of 1849, still a deed framed as this is cannot operate under the act so as to bind other creditors than those who assent to it; for it is not a mere composition deed, but a deed which, by assigning all the debtor's property to the sureties for their own benefit, places that property out of the creditors' reach.

Mr. *Bacon* in reply.

The intentions of the legislature must be gathered from

(a) 5 *De G., M. & G.* 418;
S. C., De G., M. & G., Bcy.

(b) 3 *H. & N.* 34.
 (c) 3 *De G. & J.* 95; *S. C., De G. & J., Bcy. App.* 275.

from the language which it has used. The heading prefixed to the 192nd and following sections of the act applies to three several classes of deeds, each of which is dealt with in the subsequent sections of the act upon the principle of *reddendo singula singulis*. The first of the conditions specified in the 192nd section, when it speaks of "such deed," clearly comprehends composition deeds, which are among those mentioned in the heading. The second deals with one only of the classes of deeds mentioned in the heading. The seventh cannot apply to a composition deed where there are no trustees. By the 193rd and 194th sections, the legislature requires the registration not only of each of the three classes of deeds mentioned in the heading and the opening of the 192nd section, but also of others then for the first time mentioned. And if anything more were wanting to show that the scope of the law is enlarged rather than restricted, the creditors are no longer required actually to execute the deed, but may content themselves with written assent or approval. [*The LORD JUSTICE TURNER* : Do not the words in the 193rd section, "the names and descriptions of the parties to every such deed or instrument, not including the creditors," seem to imply that the legislature was dealing with deeds to which creditors are actually parties?] No doubt the words apply to deeds to which some creditors are actually parties. But with regard to composition deeds, the act construed according to its terms comprehends them: nor is it unreasonable so to construe it, for creditors best know their own interests, and composition deeds are at once reasonable and in common use. As to the assent of Messrs. *Eaton, Cayley & Co.*, the Appellant knew when making his affidavit that they were then satisfied upon the points reserved by them, and that therefore their assent had become at that time in fact unconditional.

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But, if necessary, there may be further inquiry into the matter.

Then, it is said, that Messrs. *Eaton, Cayley & Co.* were secured creditors, and that the amount due to them for the purposes of computation was the balance only of the 1,400*l.* after deduction therefrom of the value of securities held by them, for which argument reliance is placed upon the General Orders of the 22nd of *May*, 1862. But those Orders cannot consistently with the 45th section of the act, under the authority of which they are made, enlarge the words of the act itself. The 97th section of the act is also relied upon, but its very language shows its inapplicability. Moreover, of the securities in question, the policy of assurance is valueless, and the others are not part of the Appellant's estate. There should, therefore, be no deduction. If, however, the value of these securities be assumed to exceed the amount secured, and to be wholly to be deducted to the amount of 1,400*l.*, the aggregate amount of all the debts after such deduction will be 3,549*l.* 5*s.* 2*d.*, and three-fourths of that sum, 2,661*l.* 18*s.* 10½*d.* The aggregate in value of the assents being after a like deduction equal to 2,904*l.* 12*s.* 2*d.*, the statutory majority is obtained with a margin of 242*l.* 13*s.* 3½*d.* The same result is obtained if the value of the securities from third persons is deducted, which however would be contrary to the rule in bankruptcy. For according to that mode of reckoning, Messrs. *Eaton, Cayley & Co.* are, in fact, secured only to the extent of 700*l.*, the policy of assurance for 1,000*l.* being valueless. From the total amount of debts therefore, 4,949*l.* 5*s.* 2*d.* there would have to be deducted 700*l.* the secured portion of Messrs. *Eaton, Cayley & Co.*'s debt of 1,400*l.*, and there would remain 4,249*l.* 5*s.* 2*d.*, three-fourths

fourths of which sum is 3,186*l.* 18*s.* 10½*d.* On the other hand, if from the total amount in value of assenting creditors, 4,304*l.* 12*s.* 2*d.*, there be deducted the same 700*l.*, there remains 3,604*l.* 12*s.* 2*d.*, showing even on this calculation assents greater in value than are required for the purposes of the statutory majority. *

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Judgment reserved.

The LORD JUSTICE KNIGHT BRUCE.

Whether the deed on which the Appellant relies in this case as invalidating the adjudication is an instrument so worded, an instrument such in its provisions as to come, or be capable of being brought, within the 192nd section of the Bankruptcy Act of 1861, I decline expressing an opinion at this time, but I assume, for the present purpose, that it is so. I assume too in his favor, but without asserting, that the seventh condition at the end of that section is not applicable in the present instance.

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I think, however, that he fails as to the first and fifth conditions with respect to the assent or approval required. It seems to me neither established nor probable, that before the end of the forty-eight hours mentioned in section 193, or before the entry there mentioned, or registration, the assent in writing, or approval in writing, necessary, was obtained.

Especially it is not I think shown, or likely, that as to the debt of Messrs. *Eaton, Cayley & Co.* (1,400*l.* or more

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more), the conditions mentioned in the letter of Messrs. *Thompson & Phillips*, dated the 27th September, had before or at either of those periods been complied with; and I am of opinion, that neither the deed nor the registration affects the adjudication; which cannot, as I conceive, be properly (now at least) (a), annulled. But if the Appellant shall desire to adduce further evidence before us, or if he or the persons to whom the assignment was made shall desire to bring an action to try the validity of the adjudication, I have no objection to either course being taken, though I am not for now staying proceedings under the adjudication.

The LORD JUSTICE TURNER.

This is an application on the part of *Samuel Bagley Rawlings*, the Bankrupt, to discharge an order of Mr. Commissioner *Goulburn*, confirming an adjudication of bankruptcy against him and to annul the adjudication.

The application proceeds upon this ground, that before the adjudication of bankruptcy the Bankrupt had executed a deed which it is contended was a deed of composition with his creditors within the meaning of the 192nd section of the Bankruptcy Act, 1861, and the deed had been, as it was contended, assented to in writing by the requisite proportion of the creditors both in number and value, and had been registered according to the provisions of the statute upon the affidavit of the Bankrupt verifying the fact of such assent, whereby, as it was insisted, the deed had become valid and binding upon all the creditors of the Bankrupt, including the creditor at whose instance the adjudication was made.

No

(a) See *Ex parte Burnett*, 4 475; *S. C.*, *De G., M. & G.*, *De G. & Sm.* 54; *Ex parte Bcy. App.* 68. *Bower*, 1 *De G., M. & G.* 468,

No question appears to have been raised before the learned Commissioner, as to the deed having been assented to in writing by the requisite proportion of the creditors in number and value ; but in the course of the argument before us, the written assents of the creditors were called for on the part of the Respondents, and were produced on the part of the Bankrupt: and upon the production of them it appeared to my learned Brother, and I fully agree with him upon the point, that a creditor for 1,400*l.* or upwards, who had been reckoned by the Bankrupt as an assenting creditor, had at the time of the registration given a conditional assent only and not an absolute assent, and that this debt of 1,400*l.* or upwards being deducted, there was not the requisite proportion in value of creditors assenting to the deed. It was, indeed, attempted to be made out on the part of the Bankrupt, that after deducting this debt of 1,400*l.* there would still be the requisite proportion in value of assenting creditors ; but this result was arrived at by deducting the amount of this debt from the aggregate amount of all the debts, and not from the amount of the debts of the assenting creditors only, a course of proceeding which is plainly wrong. Assuming, therefore, these facts to be properly before us, it would be impossible, as it seems to me, to maintain this deed ; but I am by no means satisfied that we ought to take notice of these matters whilst the registration stands unimpeached, and at all events these matters arise upon new evidence, and the Bankrupt therefore was well entitled to ask for liberty to adduce further evidence with respect to them. This application was made on his part and if it be persisted in, I am willing to accede to it ; but at the same time I think it right to state my opinion upon the substantial points of the case, which were adjudicated upon by the learned Commissioner, and were fully argued before us.

This

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This appeal raises two questions, one a general question extending to all cases, the other a particular question applying to this particular case. The general question is this: whether the 192nd section of the Bankruptcy Act, 1861, applies to a mere deed of composition where the deed does not contain and is not accompanied by any *cessio bonorum*. Before the passing of this act, the law was well settled that in order to validate an arrangement between a debtor and his creditors under the Consolidation Act, there must be a complete *cessio bonorum*. And it was argued in this case on the one hand on the part of the Bankrupt, that it was intended by this act to alter this state of the law, and on the other hand on the part of the Respondents that there was no such intention, the provisions of the Consolidation Act and of this act upon the subject being, as it was insisted, substantially the same. The principle on which this act is framed seems to me to determine this question in favor of the Appellant's view. This act is not framed upon the principle of repealing and re-enacting. Where no alteration is intended to be made, the Consolidation Act is left in force. Where alteration is intended, the enactment of the Consolidation Act is repealed. Seeing, then, that the enactments of the Consolidation Act upon this subject are repealed we must, I think, conclude that an alteration in this respect was intended.

The question then must be, to what extent was the 192nd section intended to effect the alteration. This must of course depend on the terms of the section. It is in these terms:—[His Lordship read it.] The terms of this section, therefore, are perfectly general; they extend to every deed or instrument between a debtor and his creditors relating to the several matters which are mentioned in the section, or any of such matters; and I do not see how it can be said, that a deed of composition

sition providing for the release of the debtor from his debts upon payment, either by him or any person on his behalf, of a composition upon those debts, although it may not contain any assignment of his estate or any part of it, does not fall within those terms. It was said however, that the conditions specified in the section and other parts of the act which were referred to in the argument, proved that no deed or instrument which did not comprise or affect the property of the debtor was contemplated as being or intended to be within the operation of the section. But, it is to be observed, that the section is not limited in its operation to composition deeds, but extends, generally, to trust deeds for creditors, which ordinarily do, and to composition and inspectorships which may or may not, affect the property of the debtor. There are deeds, therefore, pointed at by the section, to which all the conditions specified in it and the other enactments referred to would apply, and I do not think it would be a sound construction of the section to hold that it was not meant to apply to any deed unless all the annexed conditions would also apply to it. The argument would, as it seems to me, go too far. It would exclude from the operation of the section, not only releases founded on covenants to pay at a future day, but all deeds and instruments of arrangement with debtors having no available property; and this, too, notwithstanding the act, in terms, extends to insolvents of every class and description. The better conclusion, I think, is, that these conditions are to be read with reference to the subject matter to which they are applied, *reddendo singula singulis*.

On the general question, therefore, my opinion is, that this section extends to deeds of composition, although there may be no *cessio bonorum*; but I desire to be understood as expressing this opinion, with all possible

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deference to the contrary opinion expressed by one or more of the learned Barons of the Court of Exchequer, for whose opinion I entertain the highest respect.

Having said thus much upon the general question, I proceed to consider the particular question arising in this case. Although the section, in my opinion, extends to deeds of composition where there is no *cessio bonorum*, it does not, in my judgment, extend to deeds of composition of every description. I agree in the opinion expressed by one of the learned Barons of the Court of Exchequer, that in order to bring a case within the section the composition must be with all the creditors. I read the section thus:—Every deed or instrument relating to the debts and liabilities of the debtor and relating also to his release therefrom or to the distribution, &c., of his estate or to any of such matters, shall be valid, &c. In effect, the deed must relate to the debts and liabilities, and to some one or more of the other specified matters; and, I think, that the words “debts” and “liabilities,” as used in the section thus read, must be taken to relate to all the debts and liabilities; for not only is this, as I conceive, the ordinary meaning of the words, but it is scarcely possible to suppose that the Legislature could intend that all the creditors should be bound by an arrangement which was partial and confined in its operation to some of them only. In all these cases, therefore, I think, the question to be considered must be, Does the deed or instrument extend to all the creditors? Now, the deed before us in this case is as follows:—[His Lordship read it.] This deed is not, as it seems to me, a trust deed for the benefit of creditors. There is no trust fixed upon the property assigned by it. It is, as it seems to me, a mere deed of arrangement between the Bankrupt and the parties to whom the property is assigned, by which those parties come under the obligation

tion of paying the creditors of the Bankrupt to whom promissory notes were given, but no others of his creditors. No creditor of the Bankrupt could, as I understand this deed, insist in his own right, or otherwise than through the Bankrupt, on his debt being paid, or any promissory note being given to him for the payment of it.

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I agree, therefore, with the learned Commissioner, that this is not a deed of composition within the meaning of the 192nd section ; and, subject to the option on the part of the Bankrupt to adduce further evidence as to the assent, if it shall be desired on his part to do so, I think this application must be refused and with costs, to the extent of the deposit.

Mr. *Bacon* stated that there was no desire to exercise the option reserved by the Court, and the appeal was consequently dismissed.

Dec. 10.

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Ex parte WILLIAM GODDEN and JOHN
GODDEN.

In the Matter of THOMAS SHETTLE.

Nov. 24.
Dec. 6.

Before The
LORDS JUSTICES.

The word "creditors" in the first condition specified in the 192nd section of the Bankruptcy Act, 1861, means and extends to creditors holding security, good or bad, sufficient or insufficient, as well as creditors wholly without security; and in reckoning the proportion of assenting creditors under that section, the debts due to secured as well as unsecured creditors must be taken into account.

THIS was an appeal by Messrs. *William* and *John Godden*, from an order of Mr. Commissioner *Holroyd*, discharging *Thomas Shettle* out of the custody of the sheriff of *Southampton*, on the ground of his having executed a deed of composition with his creditors, within the meaning of the 192nd section of the Bankruptcy Act, 1861.

The deed in question was in the following terms:—

"This indenture made the 12th day of *August*, 1862, Between *Thomas Shettle* of, &c., of the one part, and the several other persons whose names and seals are hereunto subscribed and set, being severally creditors in their own right, or in copartnership, or being agents or attorneys of creditors of the said *Thomas Shettle* (and hereinafter called the creditors) of the other part. Whereas, the said *Thomas Shettle* being indebted unto the said several persons whose names and seals are hereunto subscribed and set, or their respective principals, in the several

Per L. J. Knight Bruce.—It is not necessary to apply to set aside the registration and certificate of registration of a deed intended to operate under the 192nd section of the Bankruptcy Act, 1861, before questioning the fulfilment of the conditions imposed by that section.

Per L. J. Turner.—In order to be binding on all the creditors under the provisions of the 192nd section of the Bankruptcy Act, 1861, composition deeds must extend to all the creditors.

Semble, per *L. J. Knight Bruce*, that under the Bankruptcy Act, 1861, the Court of Bankruptcy has jurisdiction to discharge out of custody a debtor who, after having executed a deed of composition in conformity with the 192nd section, is arrested by a creditor without the leave of the Court of Bankruptcy.

several sums of money set opposite their respective names in the schedule hereunder written, and being unable to pay the same in full, he has lately proposed to the said creditors, and it has since been mutually agreed between the parties hereto, that the said *Thomas Shettle* should pay to the said creditors, and that they should accept from him a cash composition of 4s. in the pound on the full amount, and in full discharge of their respective debts, and that upon payment thereof, the said creditors should execute the release and indemnity hereinafter contained: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises and of the payment to each of the said creditors aforesaid of a composition of 4s. in the pound, upon and in discharge of their said respective debts and claims, the receipts whereof they do hereby respectively acknowledge, they, the said several creditors, do and every of them doth, by these presents fully and absolutely acquit, release and discharge the said *Thomas Shettle*, his heirs, executors and administrators, of and from all and singular the debts, sums of money, bills, bonds, notes, accounts, reckonings, costs, charges, damages, expenses, judgments, executions, actions, suits, claims and demands whatsoever, either at law or in equity, which they the said several creditors respectively, or their or any of their partner or partners respectively, now have or shall or may or otherwise could or might hereafter have, claim, challenge or demand of, from or against the said *Thomas Shettle*, his heirs, executors or administrators, or his or their lands or tenements, goods or chattels, estate or effects, or any of them, for or by reason or on account of the debts, claims and demands of them or any of them respectively, due or owing from the said *Thomas Shettle*, and set forth in the said schedule to these presents, and all interest and arrears of interest for or in respect of the same

several

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several debts and premises, or any of them, or for or by reason of any other matter, cause or thing whatsoever relating thereto; provided always, that the release hereinbefore contained shall be without prejudice to and not extend, or be construed to extend, to prevent any of the said creditors from claiming or realising any security now held by them or any of them, or from suing any person or persons (other than the said *Thomas Shettle*) liable to payment thereof for recovery thereof. In witness," &c.

In the account of debts delivered together with the deed to the Chief Registrar, and verified by the affidavit of the debtor, in obedience to the General Orders of the 22nd of *May*, 1862 (*a*), no mention was made of the assent or dissent of fifteen secured creditors, the aggregate amount of the sums due to whom was 8,085*l.*; and the total amount of the sums due to the debtor's unsecured creditors (twenty-four in number) was stated as 1,816*l.* 17*s.* 1*d.*, of which three-fourths was 1,362*l.* 12*s.* 9½*d.* All the unsecured creditors, to an aggregate amount of 1,407*l.* 2*s.* 10*d.*, were represented as assenting to the deed, with the exception of the Appellants. Among the unsecured creditors was placed the name of *William Aldridge* as assenting for 300*l.*

On the 21st of *August*, 1862, the deed was registered under the 192nd section of the Bankruptcy Act, 1861. On the 25th, the certificate of registration under the 198th section (*b*) was granted to the debtor, and notice that such certificate had been granted was given on the 26th to the Appellants, to whom, at the same time, there was tendered on the part of the debtor a composition, calculated

- (*a*) Stated above, p. 11, note. will be found stated above, pp.
(*b*) The sections in question 8, 10, notes.

calculated at the rate of 4s. 6d. in the pound, upon the sums due to them. On the 24th of *October*, 1862, the debtor was arrested upon a judgment obtained against him at their suit, without leave of the Court, pursuant to the 198th section of the act.

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The debtor applied to the Commissioner to be discharged, and from the order made upon the application the present appeal was brought.

In opposition to the application an affidavit was filed, made by one *William H. Mackey*, which stated in effect, that the deponent had been attorney for a creditor named *Aldridge* in an action in which a verdict had been obtained for 250*l.* and costs; that, when the verdict was given, *Aldridge* had the security of a deposit of deeds of property belonging to the debtor; that subsequently to the verdict, *Aldridge* had, at the debtor's request, executed the composition deed for 300*l.*, being an aggregate of 250*l.* debt and 50*l.* costs, on an agreement that he, *Aldridge*, should receive the composition upon the whole 300*l.*, notwithstanding the deposit, which would realise the whole or greater part of his claim; that the securities were partly realised by him, and the debt thus reduced before he signed the deed; that the realisation had produced 120*l.* or thereabouts, and that the remaining part in *Aldridge's* hands would realise 100*l.* and upwards.

In answer to this affidavit the debtor made an affidavit denying that at the time of the action brought or at any other time *Aldridge* had security on property of the debtor, and stating that the security referred to was on property of another person named *Watts*; and that the deponent believed that *Aldridge*, before signing the deed, had stipulated that his consent thereto should
not

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not prejudice his right on the securities in his hands deposited by *Watts*.

Mr. *Giffurd* and Mr. *Ernest Reed* for the Appellants.

There was no power vested in the Commissioner to make the order under appeal. But even if the question of jurisdiction were conceded, the case of the Respondent would not be advanced, for the evidence shows that the conditions imposed by the 192nd section in relation to deeds intended to operate under it have not been complied with. For what is the meaning to be placed upon the expression "the creditors" found in the first of those conditions? There is nothing in the act analogous to the provisions of the 224th section of the Bankrupt Law Consolidation Act, 1849 (*a*), to render it necessary or proper to construe it as meaning, so far as it applies to secured creditors, such creditors after deducting the value of the property comprised in their securities; excluding therefore from consideration in the computation of the statutory majority fully secured creditors altogether. The omission in the present act of all words leading to that interpretation shows that the expression is used in its largest sense, and that by the majority in number representing three-fourths in value of the creditors of the debtor mentioned in the 192nd section, the legislature contemplated a majority of all such creditors secured and unsecured. The principle of bankruptcy was to apply, and every creditor was intended to have the option of coming in and being heard with respect to the deed. Even the General Order of the 22nd of *May*, 1862, which will probably be relied upon on the other side, by its schedule (*b*), requires from the debtor a statement of the "number of creditors," an expression which clearly includes

(*a*) Stated above, p. 6, note.

(*b*) Stated above, p. 12, note.

cludes secured creditors. [*The Lord Justice Turner.* The consequence of your argument will be, that the secured creditors might determine that the debtor should be released upon payment of nothing.] That may be so, but the language of the statute is clear here, equally as it is clear in the 185th and 187th sections (*a*), where the expression "the creditors" must include secured creditors and unsecured creditors alike. But even laying out of consideration the secured creditors of the Respondent, the requisite majority of assenting creditors is not made up, for *Aldridge*, as it appears by evidence, which disproves the correctness of the debtor's account, had at the time of his assent, which was reckoned in respect of a debt of 300*l.*, received from the realisation of some of the securities which he held upon *Watts'* property, 120*l.* or thereabouts, and it is calculated that he will receive from the realisation of the rest 100*l.* and upwards; and if 220*l.* be deducted from the aggregate amount of debts of assenting unsecured creditors, there will remain 1,187*l.* 2*s.* 10*d.*, and if the same sum be deducted from the aggregate amount of unsecured debts, there will remain 1,596*l.* 17*s.* 1*d.*, three-fourths of which sum is 1,197*l.* 12*s.* 9½*d.*; so that the assents are not in value equal to three-fourths of the debts.

Again, the deed in itself cannot, even upon the assumption of the fulfilment of the statutory conditions, bind non-assenting creditors. To have had that effect it should have been made with all the debtor's creditors, or with some on behalf of others, have been for the benefit of all the creditors, and have related to all the debts due from the debtor; *Walter v. Adcock* (*b*). As it is, its operation, advantages and obligations are alike by its very terms restricted to those of the creditors who execute

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(*a*) Stated above, pp. 16, 17, notes.

(*b*) 7 *H. & N.* 541.

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cute it, in which category there is not to be found any secured creditor, nor could such a creditor in the event of his security proving insufficient obtain any benefit under the deed. It may be too that the deed is invalid by reason of its containing no cession of any part of the Respondent's property, on which point we will not repeat, but claim the benefit of, the arguments recently addressed to the Court on behalf of the Respondents in *Ex parte Rawlings* (a).

They also referred to the Bankrupt Law Consolidation Act, ss. 112, 113.

Mr. *Baggallay* and Mr. *Doria* for the Respondent.

It is said that the order under appeal was beyond the jurisdiction of the Commissioner to make. The jurisdiction, however, was exercised in *In re Castleton* (b).

[*The LORD JUSTICE KNIGHT BRUCE*: Was the point raised?]

At any rate the concluding words of the 198th section of the present act afford ample authority for what has been done. The Court, which according to the explanation to be found in the interpretation clause of the Act, sect. 229, is the Court of Bankruptcy, and which by the 1st section of the Act is to exercise all the rights of the superior courts at *Westminster*, has inherent jurisdiction to enforce its own orders. Assuming therefore the deed to be of the nature contemplated by the 192nd section, it
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(a) See above, pp. 1, 24, *sqq.* The present case, and that of *Ex parte Rawlings*, were argued, the latter partially, and the former

wholly, upon the same day, the case of *Ex parte Rawlings* having the precedence.

(b) 31 *L. J., N. S., Bank.* 71.

is idle to say that the Appellants could not have obtained their rights in bankruptcy. They should have applied to the Commissioner for leave to bring an action, had they wished so to do. But not having made such an application, and having brought their action without making it, they have been guilty of a contempt of Court.

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Then it is sought to question the validity of the assents given to the deed; but whilst the registration remains unimpeached, the certificate of registration is conclusive upon the point. If, however, the Court should be of a contrary opinion, still we have the requisite assents on the part of the unsecured creditors, and more is required neither by the terms nor by the scope of the act. The act contemplates the case of composition deeds, as the terms of the heading prefixed to the 192nd and following sections and the language of the 136th and 185th sections(*a*) show, and cannot be construed as requiring the assent of fully secured creditors to a composition dividend. The changes made during the passage through the legislature of the bill which afterwards became law as the Bankruptcy Act, 1861, in the 185th and 192nd sections, completely displace the observations of the Lord Chief Baron and Mr. Baron *Martin* in *Walter v. Adcock* (*b*), as to the absence of clear enunciation of change

(*a*) See above, pp. 8, 16, notes. The 136th section is, so far as it is material, as follows:—
“In case of any claim, dispute or difference between . . . any persons claiming under a trust deed, deed of composition or arrangement, relating to any . . . debtor's estate, or to any money or property claimed as part of the estate of any . . . debtor, either party may apply . . . to the court in *London*; and it shall

be lawful for the court to determine the same, and to summon and examine upon oath the . . . trustee or any other person whomsoever, as to any matters and things concerning the . . . trust estate, and to direct such inquiries and to give such directions and make such orders relative thereto as shall to the court seem just and expedient . . .”

(*b*) 7 *H. & N.* 541.

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change from the policy of the former Act, at the same time that they demonstrate the fact of the change.

As to the question whether it was necessary for the validity of this deed, as one intended to operate under the 192nd and following sections of the act, that a cession of the debtor's property should have been part of the arrangement contemplated by it, we also are content to rely upon the arguments adduced for the Appellant in *Ex parte Rawlings*, with this additional argument, that in this case property is ceded in the shape of present payment to the creditors upon execution of the deed of the stipulated composition.

They also referred to the Bankruptcy Act, 1861, s. 97 (a).

Mr. *Giffard* in reply.

Contempt of Court implies the existence of an order of Court in respect of which the contempt is committed; but no such order exists in the present case, and the Appellants consequently cannot have been guilty of such an offence in prosecuting their action against the Respondent, who should, if desirous of stopping such action, have applied to the Court at *Westminster* whence process issued.

As to the nature of a composition deed intended to operate under the 192nd section, and as to the 136th and 185th sections of act cited on the other side, those sections point to property of some description being comprised in such a deed, a condition which a mere composition deed *ex hypothesi* does not fulfil. Moreover, this deed is partial in its operation, and contains no provision extending to the cases, for example, of contingent

(a) Stated above, p. 23, note.

tingent debts or debts payable in futuro, or whereunder creditors whose securities fail will be, in the event of loss, able to participate in the contemplated composition. As to the necessity of reckoning the secured creditors in calculating the majority required by the statute, it is material to observe that where the legislature meant to exclude them, as in the cases of petitions, provided for by the 97th section (a) of the Bankruptcy Act, 1861, it has expressly said so; and its silence on the point in the present instance is evidence of contrary intention: *expressio unius exclusio alterius*.

Judgment reserved.

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The LORD JUSTICE KNIGHT BRUCE.

In this case, one of appeal from an order made by a very able and experienced Commissioner, several points have been argued. The first is as to jurisdiction, with regard to which it was contended that the learned Commissioner had not by law authority to make the order or entertain the application upon which it was made. There having not been in the present instance actual bankruptcy, the point is, I think, reasonably open to a difference of opinion. But my impression from the 197th and 198th sections and other parts of the Bankruptcy Act of 1861 is, that the Commissioner had the jurisdiction—that it was not necessary to apply to a Judge of one of the Courts at *Westminster*—and that the Appellants' objection as to this point is not well founded, though I do not feel confident upon it. I assume however the Respondent to be so far right.

Dec. 6.

The second point relates to the meaning of the word
 "creditors,"

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“creditors,” as used in the first of the conditions forming part of the 192nd section of the Bankruptcy Act of 1861. Does that word where it occurs in that first condition mean and extend to creditors holding security good or bad, sufficient or insufficient as well as creditors wholly without security? The Respondent contends that it does not, the Appellants that it does. If it ought not to be read as the Respondent contends,—if the word “creditors” in it ought not to be limited as his counsel argue—but ought to be construed as the Appellants insist, then the majority in number representing three-fourths in value required by the first condition of the 192nd section has not in writing assented to or approved of the instrument of the 12th of *August*, 1862, in question. Consequently, if the Appellants’ reading is right, there was no bar against the Appellants from executing their judgment, and the application to the learned Commissioner was, in my judgment, groundless,—unless, indeed, the argument for the Respondent, founded on the supposed effect of registration and of the certificate mentioned in the 198th section, is well founded. But it appears to me not well founded. I conceive that neither the registration nor the certificate improves or assists the case of the Respondent for any present purpose.

What, then, is the meaning of the word “creditors” as used in the first condition of the 192nd section? If construed literally—construed according to grammar—construed according to idiom—the word must certainly, I apprehend, be read and understood as the Appellants contend. But does the context, does the general intention, does the purview, of the statute to be collected from the whole of its contents, demand or justify a departure from that reading, from that understanding? I find myself unable to answer that question in the affirmative, and especially

especially unable to say that the Respondent's case is advanced or assisted by the 97th section or the interpretation clause. It seems to me, that the word "creditors" in the first condition of the 192nd section ought to receive a literal interpretation, an interpretation in conformity with grammar and idiom, and that the Respondent's case therefore (whether on any other, or not on any other ground also) fails.

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It has been said that this interpretation is likely to produce inconvenience. It may be so; but I believe that, if it is material or relevant to consider the greater or less amount (if any) of inconvenience likely to follow from either construction, the Respondent's interpretation is likely to produce at least as much inconvenience as that of the Appellants, though (it may be) of a different kind. I do not declare or intimate an opinion as to any point raised on the appeal, but those on which I have expressly stated an opinion. Differing most respectfully from the learned Commissioner, I think that the order under appeal should be discharged.

Let me add, that if, as I am informed, the hope of a legislative revision of this Act taking place was expressed lately by one of the superior courts at *Westminster*, I join in that hope, nor will the revision, I trust, be narrow in its range or long delayed.

The LORD JUSTICE TURNER.

I am also of opinion that this order cannot be supported.

The learned Commissioner could not, as it seems to me, have any jurisdiction to make the order, unless
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the deed executed by the Respondent was valid and binding on all the creditors, under the provisions of the 192nd section of the Bankruptcy Act, 1861 ; and in my opinion this deed, like the deed in *Rawlings'* case, was not so valid and binding, primarily, I think, for the same reason as in that case, that the deed does not extend to all the creditors ; for the deed is in this form : —[His Lordship stated it.] I do not see how any creditor, not a party to the deed, could insist on coming in under it, and being paid the composition provided by it ; but beyond this there is, as it seems to me, another objection which is fatal to this deed. I think it has not the assent of the necessary proportion in value of the creditors ; for, according to the best opinion which I can form upon the point, I think that, in reckoning the proportion of assenting creditors under this section, the debts due to secured as well as unsecured creditors must be taken into account. Otherwise, creditors imperfectly secured would be left at the mercy of the unsecured creditors.

The Order of May, 1862, referred to in the argument, may probably have been intended to meet this difficulty, but I do not think that the construction of the Act can be altered or affected by any General Order.

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In the Matter of JOHN WENSLEY, a Bankrupt.

THIS was an appeal from an order of Mr. Commissioner *Perry*, of the *Liverpool* District Court of Bankruptcy, confirming an adjudication of bankruptcy against the Appellant.

The act of bankruptcy on which the adjudication was made was the execution by the Appellant of an indenture, dated the 4th of *June*, 1862, and expressed to be made between the Appellant of the first part, *Thomas Bagot* of the second part and the several persons whose names and seals were thereunto subscribed and affixed, by themselves or their several attorneys lawfully appointed for that purpose, being respectively creditors of the Appellant of the third part.

The deed recited that the Appellant was seised of or otherwise well and sufficiently entitled to the piece of land messuages and hereditaments thereafter firstly described, for an estate of inheritance in fee-simple, subject to certain incumbrances thereafter mentioned; that by an agreement of the 9th of *January* then last,

assignment, upon trust out of the proceeds of the assigned property in the first place to pay all costs, charges and expenses due or to become due to the assignor's solicitor, and the professional charges of the accountant-trustee, and other expenses, and subject thereto to divide the proceeds rateably among the creditors who should execute the deed, and the deed recited that the assignor was not prepared to pay his debts in full: —*Held*, that the necessary effect of the deed was to defeat and delay the creditors, and that it was an act of bankruptcy.

An assignment of the principal part of the assignor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, although not registered under the Bankruptcy Act, 1861.

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Before *The Lord Chancellor*
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WESTBURY.

An assignment of the principal part of the assignor's property may be an act of bankruptcy, although not executed by the assignor spontaneously, if it appear that the provisions of the deed must necessarily have the effect of delaying and defeating the assignor's creditors. And where such an assignment was made to trustees, one of whom was an accountant employed with a view to and under the as-

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expressed to be made between *Thomas Yates* of the one part and the Appellant of the other part, the Appellant agreed to purchase (along with other land) the piece of land secondly thereafter described for an estate of inheritance, and *Thomas Yates* agreed to make him certain advances to enable him to build on the land contracted for; that the Appellant, without having taken up his conveyance to the land thereafter secondly described, had recently erected thereon five dwelling-houses, and had become indebted to *Thomas Yates* in a considerable sum of money; that the Appellant was indebted to the said several persons parties to the deed of the third part in the several sums of money set opposite their respective names in the schedule thereunder written, and was not prepared to answer or pay the same; and that the Appellant had agreed to grant and convey the hereditaments thereafter described to *Thomas Bagot*, his heirs and assigns, upon trust for the benefit of the said persons, parties to the deed of the third part, in manner thereafter expressed.

By the first witnessing part, the Appellant conveyed to the use of *Thomas Bagot* his heirs and assigns two pieces of land, with certain buildings thereon, at *Everton*, in *Lancashire*, subject nevertheless, as to the hereditaments firstly described, to a mortgage and other incumbrances thereon, and as to the hereditaments secondly described, to *Thomas Yates'* lien for the residue of the purchase-money then owing by the Appellant to him, and also to certain advances made by him to the Appellant for the purpose of enabling the latter to build on the land. It was declared that *Thomas Bagot*, his heirs or assigns, should hold the premises upon trusts for sale; and should out of the proceeds discharge all costs, charges and expenses then already or thereafter to become due to the Appellant's solicitor therein mentioned,

tioned, and the professional charges of *Thomas Bagot* in his capacity of accountant therein, and the costs and charges attending the sale or sales, and the money which the trustees might disburse for the interest due to the solicitor, taxes and repairs of the said premises, and the insurance of the buildings thereof, &c. or otherwise in carrying the trusts contained in the deed into execution, and should pay to the solicitor, his executors, administrators and assigns, all principal and interest moneys then or thereafter due and owing to him; and apply the residue of such proceeds in payment of all the debts or sums of money owing by the Appellant to such of the creditors as should execute the deed, rateably and in proportion to the amount of the debts or sums of money owing to them respectively; and if, after payment of the same, any surplus should remain, should pay such surplus to the Appellant, his executors or assigns, or as he or they should direct.

There was a further witnessing part, whereby in consideration of the conveyance made by the Appellant and of the trusts of the deed, the said several and respective creditors who by themselves or the persons respectively authorised by them had sealed and delivered the deed, covenanted with the Appellant, his heirs, executors and administrators, that the present covenant should operate and enure, and might be pleaded as a release; and that creditors taking proceedings against him should thereby incur a forfeiture of their debts.

The deed was executed by the Appellant and *Thomas Bagot*, and by seven of the Appellant's creditors, but not registered as required by the Bankruptcy Act, 1861 (a).

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(a) See sect. 194, set out above, p 9, note.

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The solicitor, in his examinations before the Commissioner, stated that, besides the property comprised in the deed, the Appellant, who was a builder, had household furniture and trade utensils, and two or three pieces of land in the same neighbourhood with those comprised in the deed, under a contract for purchase from *Thomas Yates*, upon one lot of which he had commenced laying foundations. The deponent further stated, that he believed some debts to be due to the Appellant, but could not say to what amount; but he believed that *Thomas Yates* was one of the debtors to the extent of 50*l*. He did not know of any other property of the Appellant. He stated that he had prepared the deed of the 4th of *June*, in consequence of a meeting of the Appellant's creditors held on the 31st of *May* previously for the purpose of gaining time to arrange with the Appellant's creditors. He further deposed, that the incumbrances mentioned in the first recital in the deed as existing upon the property first therein described consisted of a mortgage to himself, executed in the preceding *March*, for 1,350*l*., and a memorandum of further charge of about 40*l*. executed in the following *April*. On cross-examination he stated that the circumstances which led to the preparation of the deed of the 4th of *June*, 1862, were these, that the meeting of the Appellant's creditors, held on the 31st of *May*, was adjourned to the 4th of *June*; that on the 2nd of *June* the deponent attended several of the creditors, of whom he mentioned five; and that they insisted on an assignment, one of them stating, that unless the Appellant gave up all control over the property, he would file a petition in bankruptcy against him. The deponent said that this was communicated to the Appellant on the 3rd, and that the draft was drawn, in accordance with the creditors' wishes and after communication with some of them, on the same day; he said that he was, to the knowledge of the creditors,

ditors, to be the solicitor to carry the trusts of the deed into effect, and that the costs, charges and expenses mentioned in the deed or thereafter to become due to him were those of carrying the deed into effect; and that those mentioned as already incurred were the expenses of an attempted sale made upon the instructions of the Appellant, and some preliminary charges in reference to the Appellant's affairs, altogether amounting to about 32*l*.

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The Appellant in his examinations stated, that at the date of the deed of the 4th of *June*, the amount of his unsecured debts was about 440*l*., and that the property assigned by the deed was sufficient to pay on that day 40*s*. in the pound; that the deed was executed in consequence of pressure put upon him by the creditors. That on the 4th of *March*, 1862, he had had an offer of 2,000*l*. made to him for the property in mortgage to the solicitor, also an offer of 1,600*l*. for one house out of the four comprised in that mortgage; that the value of the remaining three houses had been valued in *November*, 1861, by an architect, and should be worth at least 650*l*., they bringing in 61*l*. a year; that the Appellant estimated the value of the property mortgaged to the solicitor at 2,600*l*. By the certificate of the architect mentioned by the Appellant as having valued the property in *November*, 1861, it appeared that this architect had estimated its value at 2,280*l*.

Thomas Bagot in his examinations proved that, upon the occasion of an attempted sale on the 14th of *October*, 1862, he was authorised by three of the Appellant's creditors to place a reserved bidding on the first lot at 1,800*l*.

On cause being shown against the adjudication the
Commissioner

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Commissioner held, that the execution by the Appellant of the deed of the 4th of *June*, 1862, constituted an act of bankruptcy, and confirmed the adjudication.

Mr. *De Gex*, for the Appellant, took a preliminary objection that, the deed not having been registered as directed by the statute should not have been received in evidence, the terms of the act being positive and express; and he contended, that by admitting the unregistered and unstamped document in evidence for the purpose of founding an adjudication upon it, the Commissioner had admitted it for the purpose of giving effect to it, and not for a merely collateral object, so as to bring its admission within the exceptional cases decided under similar enactments.

The LORD CHANCELLOR said, that although the deed could not have been received in support of any title or release under it, as for example against any creditor suing the debtor, or taking proceedings against him in trover or ejectment, yet, as the act of and as against the debtor, and for the purpose of undoing the effect of the deed, it was receivable in evidence (*a*).

Mr. *De Gex*. Upon the merits of the case this deed does not, according to the evidence, comprise the whole or substantially the whole of the debtor's property. It is therefore not on the face of it an act of bankruptcy, and in order to prove that it is one, the Respondents must prove that it was a dealing in the nature of a fraudulent preference (*b*). But in order to make out
a case


(*a*) See, on the Stamp Acts, *Coppock v. Bower*, 4 M. & W. 361, and cases there referred to. See also *Rex v. Hall*, 3 Stark. 67; *Rex v. Reculist*, 2 Leach, 706; *Evans v. Prothero*, 1

De G., M. & G. 572; *Parmiter v. Parmiter*, 1 J. & H. 135.

(*b*) See *Balme v. Hutton*, 2 Y. & J. 108, 109; *Hale v. Allnutt*, 18 C. B. 526.

a case of fraudulent preference two things must be shown; first, that the deed was executed spontaneously, and secondly, that it was executed in contemplation of bankruptcy. In *Van Casteel v. Booker* (a), Mr. Baron *Parke* said, "To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors by proving it to be voluntary *and* in contemplation of bankruptcy, and if it is made in consequence of the act of the creditor, it is not voluntary." In that case, Mr. Baron *Rolfe* who had tried the cause said, "If the law be that anything which emanates from the creditor is sufficient, then my ruling was incorrect, for it was calculated to convey the impression that there would be a fraudulent preference, unless payment was demanded with importunity and pressure, and not requested as a matter of favour," and the Court held that this was a misdirection, and made the rule absolute for a new trial. *Gibbins v. Phillips* (b), was also a case on a rule for a new trial on the ground of misdirection, the Judge having said to the jury "The most important thing to be considered is whether this was a voluntary deed and done in contemplation of bankruptcy, for then it would be a fraudulent deed." It was in that case contended in the argument, that the learned Judge had erroneously put to the jury two things as necessary, that the deed was voluntary *and* in contemplation of bankruptcy: whereas it should have been in the alternative, viz., whether it was voluntary with intent to defeat or delay creditors, *or* in contemplation of bankruptcy. But Mr. Justice *Bayley* in giving the judgment of the Court said, "There does not appear to have been any misdirection on the part of the learned Judge." . . . It was

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(a) 2 *Exch.* 706; see what is said by C. J. *Erle* on these cases in *Edwards v. Glyn*, 2 *El. & El.* 49.

(b) 7 *B. & C.* 729.

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was necessary that there should be two ingredients in the transaction of the bill of sale in order to make it an act of bankruptcy, viz., fraud and the delay of creditors." *Johnson v. Fesemeyer* (a), is to the same effect, and in many respects resembles the present case. Not only have the Respondents failed to prove either of these requisites, but the evidence shows clearly that the deed was executed at the instance of the creditors, and that the Appellant had good reason for believing that his estate would pay 20s. in the pound and leave a surplus. [The LORD CHANCELLOR: Must not such a deed have necessarily delayed and defeated the assignor's creditors in their proceedings?] Not in the circumstances of this case. But as the deed does not comprise all the property, it would not be enough that it to some extent defeated some of the creditors, for this may be said in every case in which there has been a conveyance or assignment of part of the debtor's property made to some or one only of the creditors upon a request, and not spontaneously, and in which the debtor cannot pay his debts in full. But here the creditors have not been in fact defeated or delayed, the arrangement made by the deed being one under which every creditor will certainly receive a much larger and more speedy dividend than he will under the bankruptcy, should it proceed, and will in all probability be paid in full; whereas the expenses of a bankruptcy, and the disadvantageous mode of realising the property under it, render such a result in the latter event very unlikely.

Mr. *Bacon* for the Respondents was not called upon.

The

(a) 25 *Beav.* 88; 3 *De G. & J.* 13.

The LORD CHANCELLOR.

The case before me is that of a man, who being in insolvent circumstances, admitting indeed under his hand and seal that he is not prepared to pay his debts, makes a conveyance of what upon the evidence appears to be the principal part of his property, the primary object of that conveyance being to give a general sweeping charge in favor of his solicitor, a charge framed so as to extend not merely to debts due at the time of the execution of the conveyance, but to debts thereafter to become due; and in the next place to give a similar charge in favor of the trustee, an accountant. Then come directions for the sale of the residue of the property comprised in the deed, and for the application of the proceeds of the sale after satisfaction of the general charges to which I have adverted in favor of such creditors as come in and execute the deed.

Now there may be an act of bankruptcy committed by voluntary payment of money in preference of a particular creditor on the part of a man who knows himself to be so insolvent, that he must expect bankruptcy to be the necessary consequence of the payment. There may be an act of bankruptcy committed by a fraudulent gift of part of a man's property to a particular creditor under like circumstances. But there may also be an act of bankruptcy committed by the execution of a conveyance so framed, and accompanied by such circumstances, as that the general body of creditors will be thereby defeated or delayed in their proceedings for the purpose of having the debtor's property administered according to the law in bankruptcy. The question in the present case is, whether the Commissioner was not right in holding the present deed to come under that category. The Appellant's counsel argues that in the circumstances of the

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the case this was not a probable consequence of the deed, inasmuch as it appears upon the evidence that the Appellant's property was so large that he might well place it in its present situation, and yet reasonably entertain the belief that the consequence of his so doing would be to promote the interests of his creditors rather than to delay them. I cannot come to that conclusion. The deed seems to me a very improper one.

The evidence as to the value of the Appellant's property fails to satisfy me that the property was of such value as to justify its being placed in that position. I think that the deed, made as it was under circumstances of avowed insolvency, was made merely for the purpose of keeping the management, conversion and distribution of the property entirely in the hands of the Appellant's solicitor, and is not such a deed as can be supported; and if it cannot be supported, it is an act of bankruptcy within the meaning of the statute. I think that the learned Commissioner's conclusion was correct, and I shall not disturb his order.

Ex parte THOMAS PAGE and GEORGE PAGE.
In the matter of WILLIAM COOPER NEAL.

THIS was an appeal from an order of Mr. Commissioner *Sanders* of the Court of Bankruptcy for the *Birmingham* district, refusing to adjudicate the Respondent *William Cooper Neal* a Bankrupt, under circumstances and upon grounds stated in the Commissioner's judgment to the following effect:—

"*Thomas and George Page*, carrying on business in partnership as iron founders, have on the 29th of *October*, 1862, presented a petition for adjudication of bankruptcy against *W. C. Neal*, now out of business, but lately carrying on business in partnership with *T. Martin* as bedstead manufacturers, and the petition has been adjourned till this day. The act of bankruptcy on which it was intended to rely is a deed dated the 22nd of *August*, 1862, by which *Neal* and his late partner *Martin* conveyed and assigned all their estate, real and personal, to three trustees, *N. Fellows*, *R. Hill* and *W. Batson*, on trusts for division among their joint and several creditors. The deed being in the possession of the trustees, a summons was sent by the Petitioners to the solicitors of the trustees to produce the deed, which was accordingly done: but upon its production, it appeared by an indorsement upon it to have been registered under the Bankruptcy Act, 1861, on the 18th of *September*, 1862. The

solicitor

ground, among others, of the rejection of evidence should state that ground.

The certificate of registration of a deed of arrangement with creditors under the 192nd section of "The Bankruptcy Act, 1861," is only *prima facie* evidence of the fulfilment of the requisites of that section to which the certificate extends, and may be controverted without a separate proceeding to set it aside.

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The 32nd of the General Orders in Bankruptcy of 6 Nov. 1861, providing that no new evidence shall be received on any appeal, unless the Court of Appeal shall, on the hearing thereof, so direct, applies to evidence upon the matters in issue, and not to evidence as to what took place in the Court below.

In the former case some ground must be shown for the admission of the new evidence.

It is not necessary that a notice of motion by way of appeal, on the

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solicitor producing the deed proved to me in the form required by the General Orders that the conditions required by the act had been fulfilled, and he produced to me the certificate of the due registration of the deed signed by the chief registrar in the form pointed out by the General Order. It was proved to me also that the solicitor on producing the deed to the registrar had delivered to him the memorandum required by Order 19 of General Orders, and that the affidavit required by the same Order and the certificate of the trustee thereby also required had been duly made in the form there propounded. The memorandum of registration already mentioned to have been indorsed on the deed was also in the proper form. I considered that, so far as the matters referred to in the certificate of the chief registrar are concerned, that certificate was intended by the act to be evidence at least *primâ facie* of the truth of them. But as according to the form of the certificate and the other documents referred to, there appeared to be no distinct proof or recognition of the performance of the provisions required in articles 2, 3 and 7 of s. 192 of the Act of 1861, I required proof to be made of them: and evidence having accordingly been laid before me that the trustees had executed the deed, that the execution of the deed by the debtor was attested by a solicitor, and that immediately upon the execution thereof by the debtor all the property comprised therein had been given to the trustees, who, as it was stated to me and not denied, have since sold and realised a considerable portion thereof and are ready to make a dividend thereout, I declined to make the adjudication of bankruptcy sought by the petition."

From this decision Messrs. *Thomas and George Page* appealed.

Mr. *De Gea*, in support of the appeal, tendered in evidence

evidence an affidavit, which had not been before the Commissioner, and which stated that the petitioning creditors had tendered before the Commissioner evidence to show that the conditions specified in the 192nd section of the Act of 1861 (a) had not been complied with, but that the Commissioner declined to receive such evidence, holding that while the certificate remained undischarged it must be accepted as evidence of the fulfilment of those conditions which were certified by it to have been fulfilled.

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Mr. *Little*, for the Respondent, objected that consistently with the 32nd of the General Orders in Bankruptcy of the 6th of *November*, 1861, the affidavit being new evidence could not be received on the present appeal unless the Court should now so direct.

The LORD CHANCELLOR.

The rule applies only to evidence as to matters in issue, and not to evidence as to what took place before the Commissioner. With regard to the former the leave of the Court is required, and will not be given as a matter of course merely for the asking. The latter description of evidence could not be requisite if the proceedings contained a note of all that took place. Do the Respondents desire an opportunity of answering the affidavit, remembering that it will be at their peril in respect of costs if they do not displace what is stated in the affidavit?

Mr. *Little* said that he desired to have such an opportunity, but contended that the notice of motion by way of appeal ought to have stated that it was on the ground of the rejection of evidence, and that as it did not so state, the point could not be raised.

The

(a) Stated above, p. 8, note.

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The LORD CHANCELLOR, without calling on the Appellants' counsel, overruled the objection, and said that the Respondent in this case might have time to answer the affidavit, but that his Lordship desired it to be understood in future that the order only applied to evidence upon the matters in issue, and that it would not go to the extent of excluding evidence as to what took place before the Commissioner. In the present case, it was material to know whether the petitioning creditors did request the Commissioner to give them an opportunity of controverting the things stated in the certificate.

Mr. Little. I submit that the registrar's certificate ought to be received as sufficient evidence of the facts which it certifies, unless the person who disputes its correctness takes some proceedings for the purpose of discharging it.

The LORD CHANCELLOR.

Has not a creditor a right to go before the Commissioner and to say, "I rely on that deed as an act of bankruptcy?" and if the trustees of the deed thereupon say to the Commissioner, "We are in a condition to show that the requisites of the statute have been complied with," and produce the certificate, cannot then the creditor say, "I can show by evidence that the statements in the certificate, which are founded upon the representations of the parties to the deed, are incorrect," and ought he not to have an opportunity of so doing?

Mr. Little. What I submit to the Court is, that as the certificate is issued and filed and the consequent statutory effect has accrued to the deed, the proceedings of the person who seeks to impeach the validity of the certificate ought to be directed to some process to set
aside

aside the certificate. Such a course would be analogous to the practice with regard to an order in chancery which had been improperly enrolled. So here the proper proceeding would be one in the nature of a motion to take the certificate off the file.

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That would be an unnecessary formality, because the same thing is involved in making an application to treat the deed as an act of bankruptcy, and the statute does not provide any process for discharging the certificate. The certificate is only *prima facie* proof. It cannot preclude the right of any one to challenge the facts which are stated in it. The matter had better stand over, and if the Respondent finds the statements of the Appellants incorrect, he will answer the affidavit; if otherwise, he may go to the Commissioner with a renewed application to enter into the question—whether this deed was or was not an act of bankruptcy. If duly registered, it was not; if not duly registered, then it may have been.

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Jan. 14.

On this day the matter was mentioned again, affidavits having been filed on both sides, differing in their representations of what had taken place before the Commissioner, and after some discussion the matter was again ordered to stand over, with liberty for the Appellants to go before the Commissioner and renew their application for an adjudication of bankruptcy against the Respondent, with the intimation of his Lordship's opinion that the certificate of the registrar did not exclude the testimony proposed to be adduced on the part of the Appellants.

The matter was afterwards, as it is understood, arranged between the parties.

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Ex parte CHARLES MORGAN, FRANCIS BRYANT
ADAMS, FRANCIS BRYANT ADAMS the
younger, and CHARLES MORGAN the younger.

In the Matter of WILLIAM HENRY WOODHOUSE,
a Bankrupt.

Jan. 28, 30.

Before The
Lord
Chancellor
LORD
WESTBURY.

The registra-
tions of trust
deeds under
the 192nd
and under the
194th sections
of the Bank-
ruptcy Act,
1861, although
in practice
performed by
the same
officer, are dis-
tinct, and have
different opera-
tions; and
where for the
want of the
papers re-

THIS was an appeal from an order of Mr. Commis-
sioner *West*, of the Court of Bankruptcy for the
Leeds district, dismissing the Appellant's petition for an
adjudication of bankruptcy against the Respondent.

By an indenture dated the 25th of *October*, 1862, and
expressed to be made between the Respondent of the
first part, *Richard Brook, Joseph Woodhead and George
Milthorp*, trustees for themselves and the rest of the cre-
ditors of the Respondent, parties thereto of the second
part, and the several other persons whose names and
seals were thereunto subscribed and set, being respec-
tively creditors of the Respondent, of the third part,
after reciting that the Respondent being justly and truly
indebted

required by the orders registration under the former section had been refused by the
officer, and the applicant had registered the deed under the 194th section:—*Held*,
that the registration did not prevent the deed, which was an assignment of all the
debtor's property, from being an act of bankruptcy.

The 192nd section applies only to deeds which contain provisions for the benefit of
all the debtor's creditors, and this requisite is not fulfilled by a deed the trusts of which
are for the benefit of such of the debtor's creditors as shall execute the deed within a
limited time.

Semble, that a deed, to be entitled to the benefit of the provisions of the 192nd sec-
tion, need not comprise the whole of the debtor's property.

Semble also, that the creditors under a trust deed are placed in *codem statu* with cre-
ditors under a bankruptcy, and that as the latter cannot prove, without allowing for
the value of their securities, the former are subjected to the same obligation.

indebted unto the said parties thereto of the second and third parts in the several sums set opposite to their respective names in the schedule thereunder written which he was unable to pay in full, had therefore proposed and agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors, as therein-after mentioned, the Respondent assigned unto the said trustees, their executors, administrators and assigns, all and every the stock-in-trade, goods, wares, merchandises, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents, and writings, and all other the personal estate and effects whatsoever and wheresoever of him, the Respondent, in possession, reversion, remainder or expectancy, upon trust to collect, receive or sell and dispose of the said thereby assigned premises and every part thereof, either by public sale or private contract, and in one or more lot or lots, with liberty to give any credit for the same, or to take any security for the purchase-money or any part thereof, as to the said trustees, their executors or administrators should seem proper; and, upon trust, out of the moneys to be received by virtue of the deed, to pay all costs and expenses of proposing, preparing, ingrossing and executing the deed, and attending or relating to the said thereby assigned premises or the trusts created by the deed; and in the next place to pay, retain and satisfy, rateably and proportionably, and without any preference or priority to themselves, the said trustees and their partners, and the other persons, parties to the deed, of the third part, who should execute the deed within twenty-eight days from the date thereof, the several debts or sums set opposite to their respective names in the said schedule to the deed, subject to the covenant thereafter contained for verifying the amounts thereof, and to pay the residue (if any) of the said

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moneys unto the Respondent, his executors, administrators and assigns: provided always, that it should be lawful for the said trustees to make to the Respondent such allowance or return to him such part of his household furniture or effects not exceeding the value of 20*l*., as they might deem expedient; and also to employ the Respondent, or any other person or persons, in winding-up the affairs of the Respondent, and in collecting and getting in his estate and effects thereby assigned and in carrying on his trade, if thought expedient by them, and to allow to the Respondent, or any other person or persons so employed as aforesaid, out of the said trust estate, such sum and sums as to the said trustees should seem proper.

Then followed a power of attorney from the Respondent to the trustees, and a clause empowering them to give receipts, which were followed by a proviso, covenant and agreement by and between the said several parties to the deed that it should be lawful for the said trustees, at the expense of the said trust estate, to require the amount of any debt or debts of any or either of the several creditors parties to the deed to be verified by solemn declaration, or in such manner as to the said trustees should seem expedient; and in the event of any such creditor or creditors refusing or failing so to verify his, her or their debt or debts, then such creditor or creditors so refusing or failing as aforesaid should lose all benefit, dividends and advantage to be derived from or otherwise claimed under the deed, anything therein contained to the contrary notwithstanding; and thereupon the said trustees were thereby authorised and empowered to pay such last-mentioned dividends or dividend unto the Respondent. And the trustees were authorised and empowered to pay or make such arrangements with the creditors whose debts were under 10*l*., as they the said trustees might deem expedient.

It

It was then provided, declared and agreed, that any resolution signed by the majority in number and value of the creditors, parties to the deed, should be binding on all the several parties thereto, and should be effectual for the allowance and passing of the accounts of the trustees, and for discharging them from the trusts thereof, and from all claims and demands in respect thereof; and that all questions relating to the trust estate should be decided according to English bankrupt law.

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Then followed a trustees' indemnity clause, and provisions for the deposit of the trust moneys in bankers' hands and for drawing cheques; and the deed closed with a general release of the Respondent by the "said several creditors, parties" to the deed, "of the second and third parts," subject to the proviso next thereafter contained, being a proviso for avoidance of the release in case the Respondent had concealed or kept back any part of his estate and effects to the value of 20*l*., except the linen and wearing apparel of himself and his family.

All the formalities required by the General Order of the 22nd of *May*, 1862, for the registration of a deed under the 192nd section (a) of the act, not having been complied with, the deed was registered—as was stated, both in the memorandum of registry filed in Court and on the face of the memorandum of registration written on the deed in pursuance of the 196th section—under the 194th section of the act; and in the short statement of its nature contained in the former memorandum, it was described

(a) The sections and General Order in question, and the sections of the Acts of 1849 and 1861, referred to in the course of the arguments and in the Lord Chancellor's judgment, will be found set out above, p. 6, *seq.*

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described as "an assignment of personal estate and effects of the said *William Henry Woodhouse*, in trust for the general benefit of all his creditors."

The Appellants filed a petition for adjudication of bankruptcy against the Respondent; and upon an application by the Respondent for the dismissal of the petition, the learned Commissioner—being of opinion that the requirements of the statute had been so far complied with as to bring the case within the 198th section—dismissed the petition.


The present appeal was from the order so made.

Mr. *Bacon* and Mr. *Clement Swanston* for the Appellants.

The execution by a debtor of a deed of this nature is an act of bankruptcy on his part, unless the deed executed can operate as a valid deed, under the Bankruptcy Act, 1861, sect. 192. The deed now before the Court cannot, however, so operate, for several reasons. In the first place, its benefits, instead of being extended to all the Respondent's creditors, are restricted to such of them only as shall execute it within an arbitrarily prescribed number of days from its date; and are not even extended to such of that limited class of creditors as may not, in addition, consent to verify the amount of the moneys due to them in a manner equally arbitrarily prescribed in the deed; and upon non-compliance with this requirement a penalty is imposed in the shape of an authority to the trustees to forfeit the dividends, which otherwise would have belonged to the defaulting creditors, in favor of the Respondent himself. No statutory majority of creditors, and no debtor, in whose favor alone such clauses can operate, can be held to be able to bind the minority by them.

Walter

Walter v. Adcock (a), *Ex parte Rawlings* (b), and *Ex parte Godden* (c), show that a deed so framed as to benefit some only of a debtor's creditors, to the exclusion of others, is not within the protection of the act. Secondly, the deed does not even purport to bind non-assenting creditors; the release being, by its terms, made capable of being pleaded against executing or assenting creditors only. Thirdly, the policy of the legislature, as evidenced in the enactments of 1849, with respect to the essential provisions of deeds of this nature required in them, as decided by the Court of Exchequer Chamber in *Tetley v. Taylor* (d), a dealing with the whole of the debtor's estate, and that policy, which has not been changed by the enactment contained in the Bankruptcy Act, 1861, is contravened by the provision contained in this deed for making allowances to the debtor and returning to him household furniture and effects to the value of 20*l.*; *Cooper v. Thornton* (e). Lastly, this deed can be no bar, under the 198th section of the act of 1861, to the Appellant's proceedings in bankruptcy; for that section gives such an effect only to deeds within the protection of and registered under the 192nd section. This deed was not registered according to the provisions of the General Order of the 22nd of May, 1862, as to leaving a copy of the deed with the Chief Registrar, but under the 194th section only,—a section introduced for fiscal purposes, and not intended to have any effect in barring proceedings in bankruptcy. The words, "given as aforesaid," used with reference to the notice spoken of in the 198th section, which is to have the effect of barring such proceedings and excluding subsequent adjudication, refers to the provisions as to notice under the 193rd section; and the notice by advertise-

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(a) 7 *H. & N.* 541.

(b) *Supra*, p. 1.

(c) *Supra*, p. 3.

(d) 1 *Ell. & Bl.* 521.

(e) 1 *Ell. & Bl.* 544.

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ment in the *London Gazette*, required in the 193rd section, applies only to deeds answering the description given in the 192nd section, in which category the present deed is not.

Mr. *De Gex* for the Respondent.

With reference to the objection that this deed does not effect a complete cession of the Respondent's property, the present act differs essentially from that of 1849, by the substitution of the word "or" in the 192nd section of the former for the word "and" in the 224th section of the latter, thus taking away one of the principal grounds on which *Tetley v. Taylor* (a), followed by *Irving v. Gray* (b) and other cases, was decided,—a difference which can only be accounted for by supposing it to have been introduced for that purpose. The alteration may have been made with reference to reasons such as were adverted to by Lord *Campbell* in the original judgment in *Tetley v. Taylor*, where his Lordship in delivering the judgment of the Court of *Queen's Bench*, and speaking of the language of the 224th section of the Bankrupt Law Consolidation Act, 1849, said:—"It is impossible to contend that these words necessarily require that the deed should provide for the distribution of all the trader's effects among his creditors; or that they exclude a deed which allows him to remain in possession of them, on payment of such a composition as is satisfactory to six-sevenths of his creditors, and on the performance of such other stipulations as they consider more for their advantage than forcing him into Bankruptcy, or requiring that his trade shall be stopped, that all his property shall be sold, and that they shall accept a dividend from the fund produced by the sale. The section, cautiously and anxiously, guards against the supposition

(a) 1 *Ell. & Bl.* 521.

(b) 3 *H. & N.* 34.



supposition that the deed to be protected must embrace all the matters which it enumerates. We can see no absurdity in supposing that composition deeds are meant to be included in the enactment. We know that they are very common in practice, and are frequently very advantageous both for the creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects; and he may be enabled to pay this composition from the assistance of friends, and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were made a bankrupt. A great power is certainly given to the six-sevenths in number and value of the creditors, but they can only place the remaining seventh in the same situation in which they have placed themselves; and it surely would not be imputing any absurdity to the legislature, the words employed by them naturally bearing such a meaning, if we suppose that they consider the risk of the six sevenths in number and value of the creditors agreeing to accept a composition less than they could obtain by resorting to their legal remedies, was so small as not to deserve consideration; or, at least, to outweigh the risk of fair and beneficial deeds of arrangement being defeated by the refusal of one or two creditors to join in the arrangement, or of dissenting creditors obtaining a preference by refusing to concur until, by a clandestine bargain, their claims are fully satisfied. Our books of reports abound with cases which have arisen out of such fraudulent transactions, and an attempt to put an end to them might be considered not unwise or unbecoming." But, besides the language of the 192nd section of the Act of 1861 being framed in the disjunctive, whilst that of the 224th section of the Act of 1849 was framed in the conjunctive, the 7th condition specified in the former section assumes that there need not be

now

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now a distribution of the whole of the debtor's estate; *Walter v. Adcock* (a). No derogation from the enactment contained in that 7th condition is implied in the authority given by this deed to the trustees to return a portion of that estate to the Respondent.—[*The LORD CHANCELLOR*: This deed relates to the whole of the debtor's estate, for that is the subject of the assignment to the trustees. Consequently the 7th condition requires the delivery of the whole of that estate to the trustees. Is that consistent with the trustees returning a part of it to the debtor?] There appears to be no inconsistency between the condition and the power which assumes the condition to have been fulfilled. It is not to be assumed that the trustees would exercise the power in any manner contrary to the interest of the creditors or the intention of the act; while if the proposition be pushed to its extreme limit, the Respondent must have delivered up everything, even to his wearing apparel. The more enlarged provisions of the present act were no doubt introduced to obviate the absurdity of such decisions as that in *Snodin v. Boyce* (b), where a trust for the distribution of all the debtor's property except such portions as would have been retainable by him under a bankruptcy was held invalid under the Act of 1849,—an absurdity thus adverted to by the Lord Chief Baron *Pollock* in his judgment in that case:—"Whatever may have been decided as to a power to retain or to give back a part of the property, I cannot assent to this—that when in a statute providing for the distribution of a debtor's property according to certain rules in bankruptcy we find facilities given for arrangement without recourse to the bankrupt law, we should hold that arrangement bad, which in the distribution and division of the property follows the very law to which these provisions for arrangement are appended

(a) 7 H. & N. 541, 561.

(b) 4 H. & N. 391.

pended in the statute in which we find this mode of doing without the bankrupt law. This arrangement is made in the pure spirit of the bankrupt law to divide all that a bankruptcy would divide; and I cannot think that when the act of parliament intended that arrangements should have effect given to them, a deed of this kind, which professes to follow the very result of the bankruptcy code, is in point of law void. I am sorry to differ from the rest of the Court, but I cannot come to this conclusion, that what the statute says in the former part of it should become wrong when carried out by deed of arrangement or inspection."

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As to the argument that this is a deed operating not upon all the Respondent's creditors, but upon such of them only as shall execute within a specified time, the limitation of time for execution by the creditors is not in cases of this nature of the essence of the contract, and creditors can come in and execute the deed after the expiration of the stipulated time; *Dunch v. Kent* (a); *Spotiswoode v. Stockdale* (b); *Broadbent v. Thornton* (c); *Nicholson v. Tutin* (d); *Raworth v. Parker* (e). And in *Whitmore v. Turquand* (f) it was held, that a trust so framed was a trust for all the creditors of the debtors. *Harris v. Pettitt* (g), and *Re a disputed Adjudication* (h), are to the same effect, and the principle is recognised by legislative enactment in the Bankrupt Law Consolidation Act, 1849, sect. 68, which remains still in force. The deed, therefore, is in effect, as it was intended to be, a deed for the benefit of all the

Respondent's

(a) 1 Vern. 260.

(b) G. Coop. 102.

(c) 4 De G. & Sm. 65.

(d) 2 K. & J. 18.

(e) Ibid. 163.

(f) 1 J. & H. 444; 3 De G.,
F. & J. 107.

(g) 31 L. J., N. S., Ch. 552.

(h) 3 L. T., N. S. 634.

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Respondent's creditors. As to the registration, it is at least *prima facie* evidence that all the conditions required by the statute have been complied with; *Ex parte Page(a)*; and the onus is consequently upon the Appellants to show, which they have not yet done, that the facts are otherwise. The act makes no distinction between registration under one section or the other, and the addition by the officer of the words "under section 194" cannot alter the statutory effect of registration. If some of the documents required by the General Order were wanting, the deed should have been sent back to have them supplied. The General Order in question is a very recent one and not generally known in the country, and in so early a case, when the statutory requisites have really been complied with, the Court would give an opportunity to the persons interested under the deed to supply the formalities required by the order. The use of the word "such" in the 198th section, in reference to the deed, the certificate of the filing and registration of which is by that section made available to the debtor as a protection in bankruptcy, grammatically construed, refers to the class of deeds mentioned in the 194th section as the last antecedent, at least as much to any other class.

[*The LORD CHANCELLOR*: Treating this deed as one registered under the 194th section, what statutory effect is given to it so as to prevent a creditor who is not a party to it from treating it as an act of bankruptcy?]

Mr. *Bacon* replied.

Judgment reserved.

The

(a) *Supra*, p. 59.

The LORD CHANCELLOR.

It was the object of the legislature in passing the 192nd section of the Bankruptcy Act, 1861, and the seven or eight subsequent sections, to give security to a private administration of an insolvent's estate against process at common law, and also against proceedings in bankruptcy. The case of *Tetley v. Taylor*, as decided in the Exchequer Chamber, had in effect nullified a great part of the benefits which would have resulted from the sections relating to deeds of arrangement contained in the Bankrupt Law Consolidation Act, 1849. As those sections are repealed, and it is therefore a decision which applies only to the construction of a portion of the statute law which is no longer in force, I may be permitted to say, with all respect, that I entirely dissent from that decision and that I think it was attended with unfortunate consequences. It seems to have been the intention of the framers of the 192nd section of the Act of 1861 to avoid the same result as that which was the consequence of *Tetley v. Taylor*.

The case of *Tetley v. Taylor* was decided on this ground, that words of release, being conjoined with words of distribution, and winding up of an estate, rendered every deed void which did not contain in it provisions for the distribution of the entirety of a debtor's estate. The effect was, that deeds of composition,—which are very frequently proceedings or dealings with part only of the debtor's estate, and which sometimes may proceed upon the acceptance of security given by third persons for the payment of instalments in satisfaction of the insolvent's debt,—were completely taken out of the operation of the Act of 1849. It will, therefore, be observed that in framing the 192nd section the disjunctive conjunction “or” is used before the words “the distribution,”

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bution," for the very purpose of arriving at a different conclusion with regard to the deeds, which were to be valid and effectual under the 192nd section. But I shall advert to that more fully hereafter.

In order to entitle the debtor to the benefit of the protection given by the subsequent clauses of this act, it became necessary to impose certain conditions. Those conditions are embodied in the latter part of the 192nd section, and one of the most material of those provisions is that relating to the registration of deeds. The principle that the majority of the creditors should be able to bind the minority was continued, with an alteration, from the Bankrupt Law Consolidation Act, 1849, in which six-sevenths in number and value of the creditors were required in order to constitute the statutory majority: whereas by the 192nd section of the Act of 1861 a majority in point of number and three-fourths only in point of value are sufficient to bind the minority, provided certain conditions be observed. As I have said, one of the most material of those conditions is the condition respecting registration. And the registration required is in a peculiar form. The deed is to be brought into the office of the chief registrar for registration. The manner in which that registration is to be effected is described in the 193rd section. An abstract is to be made of the deed and entered in a book kept in the chief registrar's office for inspection, and the abstract so made is required to be advertised in the *London Gazette*. It will be found that all the subsequent sections giving protection to a deed of this description are sections dependent entirely upon that peculiar form of registration having been pursued.

Accordingly it will be found that the 196th section relates to registration only in the office of the chief registrar. In like manner, the 197th section, a most important

important one, plainly relates only to such deeds as come within the 192nd section—that is, deeds registered in the office of the chief registrar. Again, the 198th section begins thus, “after notice of the filing and registration of such deed has been given as aforesaid.” There is no antecedent direction on the subject of notice, except the direction that “the deed registered in the office of the chief registrar shall be advertised in the *London Gazette*.” The benefit, therefore, of the 198th section, which is most material, is given exclusively to those deeds which have been advertised in the manner I have mentioned. The 199th section, in like manner, refers entirely to deeds which have been duly registered in the manner prescribed by the 192nd section. The 200th section also plainly refers to a deed of a similar description.

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It is plain, therefore, that the protection intended by the statute to be given to a deed under the 192nd section was a protection extending only to such deeds as should be duly registered in the manner and form required by that section and the 193rd, which is consequent thereon. The immediate question which I have to determine is, whether the deed before me is a deed which has been so registered.

To determine that question it is necessary to observe, that in addition to the registration prescribed by the 192nd and 193rd sections, it appeared to the legislature expedient to require another form of registration for deeds which did not exactly comply with the requirements of the 192nd section, and accordingly the 194th section gives the power and imposes the obligation of registering any deed of composition or deed for the benefit of creditors, which has not been registered under the 192nd section, in the Court of Bankruptcy; and the words are material. A deed under the 192nd section is to be registered by the deed being brought into the office of the

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the chief registrar and the solemnities attending its registration are distinctly defined. A deed under the 194th section is directed to be registered simply in the Court of Bankruptcy. For convenience' sake, by a General Order, I have given both forms of registration to the same officer and to the same office; but the registration under the one section is very different from the registration under the other section. The 194th section was introduced with a double view. First, because it was apprehended that many deeds of composition might still be made which would not be brought under the 192nd section and which might have an injurious effect by reason of their being secret deeds of arrangement. The obligation, therefore, was imposed upon all persons, parties to such a deed, of bringing it in to be registered within twenty-eight days after its approval in the Court of Bankruptcy, and a penalty is attached in case of default, that the deed shall not be receivable in evidence. Another object of the enactment was this—it was felt that possibly many a deed of composition might not be perfected in the manner required by the 192nd section within the twenty-eight days, and yet that all the creditors might afterwards be willing to accede to such a deed; and therefore power was given to register, under the 194th section, a deed which did not exactly comply with the requirements of the 192nd section. These two forms of registration, therefore, being very different, the consequences of the one form do not attach to the other. The consequence of an observance, in every respect, of the terms of the 192nd section is, that the deed is binding on the minority of the creditors who do not execute or assent to it. No such consequence is attached to registration under the 194th section.

The deed with which I have here to deal was brought into the office within twenty-eight days after the date of
its

its execution, but not in a manner which admitted of its being registered under the 192nd section, and accordingly the person having charge of the deed elected to register it under the 194th section. The memorandum of the registrar endorsed upon it accordingly is that the deed has been registered pursuant to the provisions of the Bankruptcy Act "under section 194." It is impossible, therefore, that that deed can now be set up as having been duly registered under the 192nd section; and if it be not duly registered under that section, it is not binding upon the creditors who are not parties or do not assent to it. The practical result therefore is, that any creditor who is not a party to it, or did not assent to it, may deal with that deed as an act done by the debtor, not affected by section 192; and if that deed constitutes an act of bankruptcy, it is competent to a creditor, not bound by it, not being a party to it, actually or constructively, to treat it as an act of bankruptcy. The deed before me plainly is an act of bankruptcy, if it be not protected from that consequence by the enactment of section 192, because it is a deed conveying the whole of the debtor's property to trustees for the benefit of his creditors. That is unquestionably an act of bankruptcy, and therefore it was perfectly competent to the petitioning creditors, not being parties to that deed, not having assented to it, to avail themselves of it as an act of bankruptcy, and to require an adjudication of bankruptcy to be founded thereon.

But the matter does not rest entirely there. I regret to see the variety of determinations not consistent with one another that have taken place upon this 192nd section. I think it is perfectly clear to any person who will examine the language of that section, that it was intended to be applicable only to deeds which contain provisions for the benefit of all the creditors. I entirely agree

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agree with those determinations which have decided that if the trust deed excludes any creditor, or the deed of composition excludes any creditor, the deed is not entitled to the benefit of the provisions contained in the 192nd section. The question therefore is, whether this deed may be properly denominated a deed which, in its operation may exclude creditors of the debtor.

I think that that is the result of the particular form of the trust which is here declared ; because the trustees are not to hold the property in trust for all the creditors, with a subsequent proviso imposing upon the creditors the obligation of coming in within a given time ; but the trust is for such creditors as shall execute this deed within twenty-eight days from the date thereof : a form of trust which confines its operation to the class of creditors who shall come in and execute the deed within that period.

I am of opinion, that even had the deed been registered in conformity with the 192nd section, this particular form of trust would have been inconsistent with its sustaining that character which, in my judgment, it is necessary that it should have to entitle it to the benefit of the 192nd section.

Another point was urged before me, but which, for the reasons which I have given to support the conclusion at which I have arrived, it will not be necessary for me absolutely to determine. The point was this, that inasmuch as this deed contains a proviso that it should be lawful for the trustees to give up to the debtor property to the amount of 20*l.*, it was not a deed for the distribution of the entirety of the estate, and therefore was not a deed coming within the 192nd section. That
argument

argument proceeded entirely upon a repetition of the grounds taken in the Court of Exchequer Chamber as the basis of the decision in *Tetley v. Taylor*. I am not of opinion that the argument would have been valid or that I could have accepted that ground of determination if it had been the only ground on which this deed was assailed, because I think it clear that it is not required by the 192nd section that a deed to be entitled to the benefit of that provision should be a deed comprising the whole of the property of the debtor. It is a strange thing to observe that the whole of the beneficial operations of the clauses relating to these deeds in the Act of 1849 was completely defeated by the determination in the Exchequer Chamber, involving as it did this consequence—that there was no possibility of making a valid arrangement by a deed, unless the debtor was stripped of the entirety of his property. But the very object of these powers and of transactions of this kind is to render it unnecessary to break up the debtor, to save the debtor from the necessity of having the whole of his property sold and converted into money, his trade establishment broken up, and the power of continuing his existing status as a trader entirely taken away. The language of the 192nd section appears broader and to have been framed probably with the intention of meeting that decision. At all events, I am of opinion that what is called in that decision in the Exchequer Chamber the *cessio bonorum*—that is, the assignment of the entirety of a debtor's property—is not necessary for the validity of a deed of composition or trust under the 192nd section.

The points which I decide for the purpose of the present motion are these—that this deed was not registered under the 192nd and 193rd sections; that it was intendedally

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tionally and by the submission of the parties registered under the 194th section; that validity, as against the use now attempted to be made of the deed, is not given by the 194th section; that the present petitioning creditors, therefore, are not bound by that deed, but may treat it as an act of bankruptcy, to which I think it amounts; and further, I am of opinion that the fact of the particular trust being in very terms confined only to a certain class of the creditors gives the deed an exclusive character, which deprives it of the right of being treated as a deed which would have come within the operation of the 192nd section if it had been registered in conformity therewith.

It appears that in the present case an adjudication of bankruptcy was originally made on this deed as an act of bankruptcy. The learned Commissioner afterwards, on examining the deed, was of opinion that the case was taken out of the reach of his power to adjudicate, and he therefore dismissed the petition for adjudication. I think that I must reverse that order of dismissal; and the consequence will be that the adjudication of bankruptcy originally made will stand.—[His Lordship then, with reference to all the circumstances of the case, directed the costs of the appeal of both parties to be paid out of the estate, and proceeded as follows:—What I have decided is entirely consistent with the view taken by the Lords Justices. It should be particularly observed, as reference has been made to the Order of *May* last, which has a schedule drawing the distinction between the secured and unsecured creditors, that that distinction is most necessary by reason of the particular language of the 197th section, because as soon as a deed is entitled to the benefit of the 192nd section it was the object of the legislature by the 197th section to

to give to all parties under the deed the power of resorting to the Court of Bankruptcy whenever it might be necessary so to do. The object was to remedy the inconvenience which arose under trust deeds, which but for that enactment might, in case of any error or misfeasance, have had to be construed or dealt with by a suit in Chancery. Accordingly the 197th section causes the state of things under a trust deed to be precisely the same as it would have been had there been a bankruptcy instead of a deed, and therefore the creditors under a trust deed are placed in eodem statu with creditors under a bankruptcy. But creditors under a bankruptcy cannot prove without allowing for the value of their securities, and the creditors under a trust deed are subjected to the same obligation.

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Ex parte LAWRENCE LAWRENCE.

In the matter of a Deed of Assignment, filed &c., by
WILLIAM BEALE, of, &c.

THIS was an appeal from an order of Mr. Commissioner *Fane*, directing a warrant to issue to commit the Appellant to the Queen's debtors' prison for *London* and *Middlesex*, there to remain without bail until he should submit himself to the Court to be sworn.

May 22.
Before The
Lord
Chancellor
LORD
WESTBURY.
The commis-
sioner has
power either
under the
136th section

By

of the Bankruptcy Act, 1861, or irrespectively of that section by virtue of his authority over the trustee appointed by a trust deed within the act, to direct the trustee to be examined as to his dealings with the debtor's estate: and although it will be a good practice not to direct such examination without some ground being shown for it, the Court of Appeal will not in general entertain an appeal as to the sufficiency of such ground.

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 In re
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 ASSIGNMENT.

By an indenture dated the 11th of *January*, 1862, and duly registered, *William Beale* assigned his property to trustees upon trusts for the benefit of his creditors, the trustees being *Thomas William Hunt* and the Appellant. Certain creditors of the debtor being dissatisfied with the proceedings of the trustees applied for and obtained from the Registrar an order requiring them personally to be and appear before him on the 23rd of *February*, 1863, "then and there to be examined by virtue of the statute in such case made and provided." *Hunt* appeared and was examined accordingly: the Appellant did not, explaining his absence through his solicitor. A second summons was issued by the Registrar, requiring the Appellant personally to be and appear before him on the 2nd of *March*, 1863, "then and there to be examined by virtue of the said petition (a) and the statute in such case made and provided." The Appellant then attended, but objected to be sworn, principally on the ground that the summons ought to have alleged some "claim, dispute or difference" between the creditors at whose instance it was issued and himself as trustee, such as might give the Court jurisdiction to interfere under the 136th section of the Bankruptcy Act, 1861 (b). The matter was referred to the Commissioner, who upon the Appellant persisting in his refusal to be sworn made the order under appeal. To negative an objection on the part of the Appellant; that he had not been apprised of the matters on which it was proposed to examine him, it was in evidence on behalf of the creditors at whose instance the summonses were issued, that on the 20th of *February*, 1863, notices were served upon each of the trustees, requiring them to produce at the time and place fixed by the summons, all books, papers, accounts and reckonings between them and each of them and the creditors of *William Beale*; also,
 all

(a) There was, in fact, no petition.

(b) Stated above, p. 43, note.

all vouchers for payments of money made by them in respect of the estate, and also a statement of the receipts in relation to the same, and more particularly a full statement of account showing the disposal and realisation of the property belonging to the estate, and also an account of goods supplied for the carrying on of the business since the deed of assignment, together with their ledger, cash book, day book, purchases and sales book, waste book and invoices. Reference was also made with the same object to a correspondence on the subject which had passed between the solicitors of the respective parties, and to the form in which the application for the examination had been made to the Court, and which stated that it was intended to examine the trustees "touching the statement of accounts and disposal and realisation of the estate of the said *William Beale*."

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Mr. *Swanston* for the Appellant.

The terms of the summons were insufficient, as the Appellant should have been informed by it upon what points it was proposed to examine him. The circumstance of the summons having been signed by the Registrar only, and not by the Commissioner, shows that the Commissioner, who alone, if any one, is entitled to exercise a discretion to issue it, never exercised his discretion in the matter. Moreover, an examination could only be "as to any matters and things concerning the bankruptcy or trust estate;" *Bankruptcy Act*, 1861, *sect.* 136; and in the present case there was no "claim, dispute or difference," to justify interference under that section.

Mr. *Bagley*, for the three creditors at whose instance the summons had been granted, was not called upon.

The

1863.

Ex parte
LAWRENCE.In re
BEALE'S
ASSIGNMENT.*The LORD CHANCELLOR.*

A trustee under a trust deed stands in the same relation to creditors under the deed as that in which an assignee stands under an adjudication of bankruptcy to creditors who have proved. It was the bounden duty of this trustee to submit to the required examination under the 136th section. It would be better, possibly, in practice that a summons for the examination of a trustee should not be granted by the Commissioner without some bonâ fide ground being shown for the application. If, however, the Commissioner thought it right that the Appellant should be examined, I will not undertake to determine the sufficiency of the grounds on which the Commissioner came to that conclusion. Some limits must be set to applications of the present nature, and some distinction drawn between appeals where the Commissioner arrives at conclusions upon matters of contention between parties and cases where he arrives at conclusions upon matters of discretion. It is not at all necessary to rest the order made in the present case upon the words in the 136th section of the Bankruptcy Act, 1861, although that section contains abundant authority for what the Commissioner has done. For it is enough that the relation of trustee and cestui que trust has been created, and that the latter desires information respecting the trust estate. If a summons were taken out as of course, and upon its coming before the Commissioner he were to think the case one in which the creditors' assignee or trustee summoned ought to be examined, the Commissioner's decision would operate retroactively; and the assignee or trustee cannot be allowed to fence with the Court and to obstruct its procedure. He must, at any rate, be ready to do at the bidding of the Commissioner that which he is bound to do at all times. The present

present application is groundless and must be refused with costs.

1863.
Ex parte
LAWRENCE.
In re
BEALE'S
ASSIGNMENT.

Ex parte WILLIAM ALEXANDER.

In the matter of a Trust Deed between ROBERT THIN and WILLIAM HEDDLE FLETT and their Creditors.

THIS was an appeal from an order of Mr. Commissioner *Perry*, of the Court of Bankruptcy for the *Liverpool* district, discharging a summons issued by the Registrar at the request of the Appellant, who was trustee of a deed executed in the form of Schedule D to the Bankruptcy Act, 1861. By the summons, the Respondent *Lawrence Joyce* was required personally to be and appear before the Court of Bankruptcy at *Liverpool* on &c., then and there to be examined by virtue of the statute in such case made and provided; and then and there to bring with him and produce all books of account, accounts, invoices, sale notes, contracts, letters, papers and writings in anywise relating to or showing the transactions between him and the late partners, or either of them, and the dealings and transactions by him with and in respect of the goods and property of the late partners, or either of them, in his possession or power at the time when the trust deed was executed.

May 30.
July 18.
Before The
Lord
Chancellor
LORD
WESTBURY.
Trustees and
creditors
under a trust
deed operating
under the
Bankruptcy
Act, 1861,
s. 192, and
duly regis-
tered, are
entitled to the
same powers,
rights and
privileges as
are possessed
by assignees
and creditors
under an ad-
judication in
bankruptcy,
including the
power of sum-
moning wit-
nesses.

It appeared that the ground of the decision under appeal was, that there was no evidence, except the certificate

Seem, that
the jurisdic-
tion of the
Court of Bank-
ruptcy to sum-
mon persons

under the 197th section of the Act of 1849, for the purposes of discovery, should be exercised with care, circumspection and judicial discretion, and not in a merely ministerial way.

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ALEXANDER.

In re
THIN AND
FLETT'S
TRUST DEED.

cate of the Chief Registrar, to show that the deed had been executed or assented to pursuant to the provisions of the Bankruptcy Act, 1861.

Mr. *W. M. James* and Mr. *Bardswell* for the Appellant.

The Commissioner thought that the Chief Registrar's certificate was not sufficient evidence of the fulfilment of the conditions specified in the 192nd section of the Bankruptcy Act, 1861 (*a*), to enable him to exercise jurisdiction in the matter, and summon the Respondent as a witness. That was a conclusion which, pressed to its legitimate extent, would require that on every occasion when a witness is summoned there should be a preliminary issue joined and tried between the witness and the trustees as to the existence of the requisites to the validity of the deed, for the purpose of binding non-assenting creditors,—an issue which would thus have to be tried over and over again (the result in the case of one witness not binding another), at the expense of so much time and money as to render the provisions of the act unavailable. This could not have been intended by the legislature, and, we submit, is not according to the true interpretation of the act. The scope of its 192nd and following sections is to substitute for an administration in Court an administration out of Court merely: and under the 197th section the registration of a deed confers upon the Commissioner similar powers, including that of summoning witnesses, to those which an actual adjudication of bankruptcy would have conferred upon him.

Mr. *North* for the Respondent.

If it be said that the scope of the 192nd and following sections

(*a*) The material sections referred to during the arguments, and in the Lord Chancellor's judgment, will be found set out above, pp. 6, *seq.*, note; p. 18, note, and p. 43, note.

sections of the Bankruptcy Act, 1861, is to substitute an administration out of Court for an administration in Court, that is an admission which brings with it ground for the argument, that trustees of a deed operating under the 192nd section are not intended to be placed in the same position with assignees in bankruptcy. But even assuming, that, under the 197th section of the act, the trustees of such a deed could set in motion this extraordinary power of the Court of Bankruptcy, it cannot be said that such authority is vested in the trustees of a deed not falling within that category. It is incumbent therefore upon the Appellants to show, and the Respondent has a right to require that the Court shall be satisfied of, the due fulfilment of all the conditions specified in the 192nd section of the act. Of this the registration of the deed could be at the utmost *prima facie* evidence; *Ex parte Page (a)*; and is not, I submit, even that. For not only is the Bankruptcy Act, 1861, silent as to the effect of registration as evidence, and not only does it, by providing in its 198th section that the certificate of the filing and registration of the deed shall be available to the debtor for all purposes as a protection in bankruptcy, virtually imply that such certificate shall not be available for any other purposes, but it contains no provision such as that which was contained in the 226th section of the Bankrupt Law Consolidation Act, 1849, making such certificate *prima facie* evidence of the facts to which it relates. No attempt therefore having been made in the present case to offer other proof of the matters to which the certificate related than the certificate itself, the summons was properly discharged.

He also referred in support of his argument to the 136th, 194th, 197th and 198th sections of the Bankruptcy Act, 1861.

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 ALEXANDER.
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(a) *Supra*, p. 59.

The

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The LORD CHANCELLOR, during the argument, referred to the terms of the 120th section of the Bankrupt Law Consolidation Act, 1849, and adverted to the successive changes which had been made in the bankrupt law as to the necessity of proving on every occasion the validity of the adjudication. And his Lordship having desired to hear further argument as to the course of practice of the Court of Bankruptcy with respect to granting summonses for the examination of persons suspected of having the Bankrupt's property, &c., the case stood over for that purpose.

July 18. Mr. *James* and Mr. *Bardswell* for the Appellant.


The power of causing witnesses to be summoned in bankruptcy has been given to creditors from the earliest times, having been so given originally by the first Bankrupt Act, 34 & 35 *Hen. VIII.* c. 4, s. 2, and it has been continued through the subsequent bankruptcy statutes, 13 *Eliz.* c. 7, s. 5; 1 *Jac. I.* c. 15, s. 10; 6 *Geo. IV.* c. 16, s. 33, and the Bankrupt Law Consolidation Act, sect. 120, to the present time. It is a sufficient ground for the issue of such a summons that the assignees suspect the person against whom the summons is sought of having part of the Bankrupt's estate in his possession, and the issue of such a summons is *ex debito justitiæ* and not in the discretion of the Commissioners; *Cooper v. Harding* (a).

Mr. *North* for the Respondent.

The jurisdiction of the Court of Bankruptcy to issue summonses for the examination of persons suspected of having

(a) 7 Q. B. 928.

having parts of a Bankrupt's estate in their possession, otherwise than on the motion of the Court of Bankruptcy itself, is one capable of being made the instrument of great oppression, vexation and injustice, and ought not to be extended to other cases than those of actual bankruptcy. At any rate, I submit that the Court, before allowing its process to be set in motion at the instance of the trustee of a deed, should itself exercise some discretion in the matter, which it has not done here.

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He also referred to the Bankruptcy Act, 1861, ss. 136 and 189, and argued that the introduction into those sections of express enactments, conferring the powers now in question, showed that the omission of similar provisions in the case of deeds operating under the 192nd and following sections was intentional on the part of the legislature, and could not be supplied under the terms of the 197th section.

The LORD CHANCELLOR.

I have always thought that the power which is here brought in question was one of a singular and anomalous character, and but little reconcileable with the principles upon which English jurisprudence and the administration of justice in this country usually proceed. Still if it is a power which has been possessed by assignees in bankruptcy,—if it is a right of the assignees or a remedy of creditors under an adjudication to call for the exercise of such a power, I think that as a matter of course a corresponding power, right and remedy are given to the trustees of a registered deed and to the creditors entitled to the benefit of the deed. It was, therefore, with a desire of ascertaining how far the power of summoning persons suspected of having part of the estate of the Bankrupt in their possession, or of being indebted to him, to appear in the

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the Court of Bankruptcy without the ordinary protection which in a suit filed for discovery is afforded to the Defendant, was the right of assignees or creditors under a bankruptcy that I desired the matter to stand over.

The 197th section of the Bankruptcy Act, 1861, provides [His Lordship read it.]—It would, I think, have been much better if the bankrupt law had made this particular power exerciseable by the Court alone, and only after the existence of sufficient grounds to warrant its exercise had been judicially ascertained. The precedents, however, in the Court of Bankruptcy, confirmed as they are by the decision in the Court of Queen's Bench, to which reference has been made, show that according to the present practice in bankruptcy (which is nothing more than a continuation of the practice which has existed for a very considerable time) this right or power is considered as an ordinary "right or remedy" of assignees or creditors. The decision in *Cooper v. Harding* goes to the length of holding that the Commissioner not only is warranted but is required to grant a summons almost as a matter of course, upon being informed that an assignee or a creditor, or the solicitor who has acted in obtaining the adjudication, entertains the suspicion or the supposition that the person whom he wishes to summon has property of the Bankrupt in his possession, or is indebted to the Bankrupt.

I should be glad if in future this power should be exercised by the Court alone, and if the Commissioner, instead of acting in a merely ministerial way, should think it his duty to require some evidence upon oath to be laid before him, upon which a *prima facie* case may be made, warranting such a suspicion or supposition, and upon which the application may be justly granted. It is intolerable that a power of this kind should exist by  
 which

which the liberty of the subject may be invaded, and that a man may be summoned and tortured by questions in a Court of limited jurisdiction, a Court sitting solely for the benefit of persons whose interests are adverse to his own, and that he should be compelled to answer those questions without the protection which other Courts afford to persons in his position.

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I am bound, however, to hold that trustees or creditors under a trust deed have the same rights as assignees and creditors in the case of a bankruptcy; whence it follows that the Commissioner is bound to grant a summons at the instance of persons claiming under a trust deed just as he is bound so to do at the instance of assignees and also creditors under an adjudication. I say also creditors, having regard to the language of the Bankrupt Law Consolidation Act, 1849, sect. 120, which enacts that "after adjudication it shall be lawful for the Court to summon," &c.,—that is to say, before the appointment of assignees, and as soon as adjudication has been made. The power is, I repeat, one which, in my judgment, should be exercised with more care and circumspection and with more of judicial discretion than have hitherto apparently attended its exercise; although I am bound to say that the existing practice is justified by the language attributed to the Judges of the Court of Queen's Bench in the case of *Cooper v. Harding*.

The order of the Commissioner must be discharged and the matter remitted back to him, with a declaration that the trustees and creditors under the trust deed, it having been duly registered, are entitled to the same powers, rights and privileges, including that of summoning witnesses, as are possessed by assignees and creditors under an adjudication in bankruptcy.

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Ex parte JONES SPYER.

In the matter of the Assignment of WALTER  
JOSEPHS.

May 6.  
July 30.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

A trust deed  
for the benefit  
of creditors  
containing  
provisions for  
the application  
of the whole of  
the estate of  
the debtor in  
payment of his  
debts as in  
bankruptcy,  
contained a  
clause purport-

ing to empower the trustee to pay or make such arrangements with the creditors whose debts were under 10*l.*, and to pay the costs, if any, of the creditors proceeding against the debtor for the recovery of their debts, as the trustee might deem expedient:—*Held*, that the clause did not in either of its branches prevent the deed from binding non-assenting creditors under the Bankruptcy Act, 1861, s. 192: not in the former branch, as it only purported to give a power which, being repugnant to the rest of the deed and the law, could not be exercised: nor in the latter, as that branch might afford the means of preserving the assets for equal distribution amongst the creditors.

*Seemle*, that the whole effect of the 197th section is to give to a trust deed when duly registered a comprehensive effect upon all the estate and effects of the debtor comprised in the deed and the particular operation of making the position and relative rights of the trustees and creditors claiming under it the same as the rights of assignees and creditors under an adjudication in bankruptcy.

*Seemle* also, that secured creditors under such a deed rank for the amount remaining after deduction of the value of their securities.


*Seemle* also, that the words in the 197th section, "except where the deed shall expressly provide otherwise," refer to the insertion in the deed of a proviso for questions being settled by arbitration, or for the adoption of some different rule of administration from that adopted in bankruptcy, as, for example, with respect to joint and separate creditors.

THE Appellant was the trustee of a trust deed registered under the 192nd section of the Bankruptcy Act, 1861, and the appeal was from the decision of Mr. Commissioner *Fane*, dismissing the Appellant's petition, which sought a declaration that the Respondents were not entitled to a specific lien on part of the trust property.

The trust deed was an indenture, dated the 5th of *September*, 1862, and made between *Walter Josephs* of the first part, the Appellant therein described as "trustee

for himself and the rest of the creditors of the said *Walter Josephs*" of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being, respectively, creditors of *Walter Josephs* of the third part. It contained a recital to the effect, that *Walter Josephs* had lately carried on business under the style of *Walter Josephs & Co.*; and another recital, which was in the following terms:—"And whereas the said *Walter Josephs* has become, and is now, justly and truly indebted unto the said several persons parties hereto of the second and third parts, in the several sums of money set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full; and he hath therefore proposed and has agreed to assign all his estate and effects unto the said *Jones Spyer*, for the benefit of his creditors, as hereinafter mentioned."

By the witnessing part of the deed, *Walter Josephs* assigned to the Appellant, his executors, administrators and assigns, all and every the stock-in-trade, goods, wares, merchandises, books of account, debts, sum and sums of money, and all securities for money, vouchers and other documents and writings, and all other the personal estate and effects whatsoever and wheresoever of *Walter Josephs*, except leasehold estates and shares in any company or undertaking, in possession, reversion, remainder, or expectancy, upon trusts of the ordinary kind for collection and realisation. The proceeds were to be held upon trusts thus expressed:—"in the first place, to retain and reimburse himself all costs, charges and expenses of preparing, and making such sales respectively and attending the recovery, collecting, and getting in the said debts and other trust moneys, together with commissions and allowances usual among merchants; and also all costs, charges and expenses of proposing, preparing,

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preparing, engrossing and executing these presents, and incident thereto, including therein the costs, charges and expenses incurred in respect of meetings and other business preliminary thereto; and also to pay all salaries, wages, charges and allowances to be made to clerks, accountants, agents and subordinates; and, in the last place, shall pay, retain and satisfy rateably and proportionately, and without any preference or priority, to the said *Jones Spyer*, and the other persons parties hereto of the third part who shall execute these presents, the several debts or sums of money set opposite to their respective names in the said schedule hereto, and all other the creditors of the said *Walter Josephs*, subject to the covenant hereinafter contained for verifying the amounts thereof, and to pay the residue (if any) of the said moneys unto the said *Walter Josephs*, his executors, administrators or assigns."

Then followed a provision, enabling the Appellant to employ *Walter Josephs*, or any other person or persons, as managers, accountants, clerks, agents, or collectors, in winding-up the affairs of the estate, and in collecting and getting in the trust estate and effects, and in carrying on the business if thought expedient by him, and to allow *Walter Josephs*, or any other person or persons so employed, out of the trust estate such sum and sums as to the Appellant should seem proper. Then came ordinary trustee clauses, and a power of attorney from *Walter Josephs* to the Appellant, expressed to be given "with the consent of the said several creditors parties hereto of the third part."

The deed proceeded to the following effect:—

"Provided always, and it is hereby covenanted and agreed by and between the several parties hereto, that it shall be lawful for the said *Jones Spyer*, at the expense

expense of the said trust estate, to require the amount of any debt or debts of any or either of the several creditors, parties hereto, to be verified by solemn declaration or in such other manner as to the said trustee shall seem expedient, and in the event of any such creditor or creditors refusing or failing so to verify his or their debt or debts, or declining to execute these presents, then such creditor or creditors so refusing or failing or declining as aforesaid shall lose all benefit, dividends and advantage to be derived from or otherwise claimed under these presents, anything herein contained to the contrary notwithstanding. And, thereupon, the said *Jones Spyer* is hereby authorised and empowered (but it is not incumbent on him) to pay such last-mentioned dividends or dividend unto *Walter Josephs*, his executors, administrators or assigns: and the said *Jones Spyer* is hereby authorised and empowered to pay or make such arrangements with the creditors whose debts are under 10*l.*, and to pay the costs, if any, of the creditors proceeding against the said *Walter Josephs* for the recovery of their debts, as he the said *Jones Spyer* may deem expedient."

The deed contained a proviso and agreement, that any resolution signed by the majority in number and value of the creditors, parties to the deed, should be binding on all the several "creditors hereto," and should be effectual for the allowance and passing of the accounts of the Appellant, and for discharging him from the trusts of the deed, and from all claims and demands in respect thereof: and that all questions relating to the trust estate should be decided according to English bankrupt law; followed by further trustee clauses. Then came a general release on the part of the creditors, parties thereto "of the second and third parts," but without prejudice to securities and rights against persons other than *Walter Josephs*.

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D.J.S. There

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There was also a covenant on the part of *Walter Josephs*, at the request of the Appellant, and at the expense of the trust estate, to convey, surrender, assign, or otherwise assure all freehold, copyhold and leasehold estates and shares of or to which *Walter Josephs* was then seised, possessed, interested or entitled in possession, reversion, remainder, or expectancy, subject to any incumbrances affecting the same or any part or parts thereof, to the Appellant, upon the trusts aforesaid, or in such other manner as he should direct. And there was a proviso avoiding the release, in the event of *Walter Josephs* having concealed or kept back any part of his estate or effects to the value of 20*l*.

The deed was assented to by the requisite majority, including the Respondents, whose several assents, however, were as follows:—"We object to execute such deed, as we claim a specific lien upon the proceeds of certain goods, which constitute a considerable part of our debt; but, subject and without prejudice to our claim to be paid specifically out of such proceeds, we assent to and approve of such deed of assignment."

The deed having been registered under the 192nd section of the Bankruptcy Act, 1861 (*a*), the Appellant *Jones Spyer*, the trustee, presented the above-mentioned petition to the Court of Bankruptcy, for the purpose of contesting the Respondent's claim to a specific lien. On this petition, the Commissioner expressed his opinion that several of the provisions of the Act of Parliament had not been observed, and that he was therefore unable to

(*a*) The material sections of the acts of parliament referred to during the arguments, and in the judgment, in the present case, are set out above, p. 6, 199., notes, and p. 43, note.

to proceed further in the matter, and made the above-mentioned order of dismissal, with costs; which, however, the Commissioner thought, ought to be paid out of the trust estate.

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Mr. *Bacon* and Mr. *Roxburgh* for the Appellant.

The objections urged against the case of the Appellant on the part of the Respondents in the Court below were these. It was said, that the deed was not one within the protection of the 192nd section of the Bankruptcy Act, 1861:—first, because a portion of the debtor's property was excluded from the assignment; secondly, because the trustee was authorised to return a part of the debtor's property to the debtor; thirdly, because the trustee was empowered to pay creditors under 10*l.* in full, and to pay the costs of creditors proceeding against the debtor; and fourthly, because creditors who did not execute the deed were excluded from its benefits. In the next place, it was argued that secured creditors should have been reckoned at the full amount of the sums due to them, in computing the statutory majority of creditors executing, assenting to or approving the deed: and, lastly, it was contended that as the Respondents had not, as was contended, submitted and did not submit to the jurisdiction of the Court of Bankruptcy, that Court had no jurisdiction to decide, as against them, the question of lien.

[Mr. *Sargeod*, for the Respondents, admitted that after deducting the values of securities held by secured creditors, the majority of creditors required by the first condition of the Bankruptcy Act, 1861, sect. 192, had been obtained. He also stated that, after *Ex parte Morgan* (a), he

(a) *Supra*, p. 64.



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he did not intend further to press the objection that secured creditors were not reckoned at the full amount of the sums due to them, or the objection, that the leasehold property and shares of the debtor were improperly excepted from the assignment.]



Then the trust here is not for some only of the creditors as it was in *Ex parte Morgan*, but is for all. The subsequent provision, that creditors declining to execute the deed shall be excluded, cannot invalidate it. For no application for them to execute the deed would be made, their assent or approval being sufficient even for the purpose of constituting a majority; and even where a time is fixed for the execution of the deed, a creditor is not excluded who comes in afterwards; *Whitmore v. Turquand* (b). As no creditor is excluded, the deed is within the terms of the 192nd section; and any of this debtor's creditors could, by application to the trustee, or, if necessary, by applying under the Bankruptcy Act, 1861, to the Court of Bankruptcy, have obtained his dividend. There remains the objection as to the jurisdiction; but that is answered, if not by the enactment contained in the 136th section of the Act of 1861, by the enactment contained in the 197th section.—[*The LORD CHANCELLOR*: Is not this question involved in the other? If the deed is a valid deed within the 192nd section, are not the Respondents bound by it in their capacity of creditors? If they are bound by the deed, the Court has jurisdiction over them.] —Quite so: and it cannot be worth the Respondents' while to upset the deed in bankruptcy, simply for the purpose of having the question of their specific liens determined by a suit in equity. But, however that may be, the Respondents have, as a matter of fact—save with respect

(b) 1 J. & H. 444; 3 De G., F. & J. 107.

respect to this one question of their specific liens—  
assented to this deed.

Mr. *Sargood* for the Respondents.

This is a deed for the benefit of the debtor, not for the benefit of the creditors; and it is open to several objections. It is true, that the division is to be made amongst the trustee and the creditors who shall execute, and all other the debtor's creditors; but that is subject to a proviso and covenant by the parties to the deed, that they must verify the amounts due to them as the trustee may require, and that any creditor who fails so to verify or declines to execute the deed shall be excluded, and that the dividend of such creditor may be paid to the debtor. —[*The LORD CHANCELLOR*: The clause being of the nature of a clause of forfeiture should be construed strictly. So construed, it is nonsense; for it is to operate in the event of some of the parties to the deed, of the third part, declining to execute it; those parties being expressed to be persons whose names and seals are subscribed and set to the deed.]—Again, the trustee is authorised to make such arrangements with the creditors the debts due to whom are under 10*l.*, and to pay the costs of the creditors proceeding against the debtor for the recovery of their debts, as the trustee may deem expedient. Each of these provisions contravenes the spirit of the act of parliament by subverting that due equality amongst the creditors which, as it was required in the case of arrangements by deed under the Bankrupt Law Consolidation Act, 1849, *Gardner v. Chapman* (*a*), so should obtain in deeds of the like nature under the Bankruptcy Act, 1861. Finally, the Court of Bankruptcy had no jurisdiction in the matter, whether the deed was good

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(*a*) 8 C. B., N. S., 317.

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or bad, for it is the case both of the Appellant and of the Respondents, that the latter are, as regards the securities, which they claim, and their rights to them, strangers to the deed, who have not in any way submitted to the jurisdiction of the Court of Bankruptcy, and over whom that Court, consequently, has no controul. Neither the 136th nor the 197th section, relied on on the other side, gives that controul; the former applying only to persons claiming under a trust deed; and the latter to creditors bound by the deed: and the Respondents prefer to try any questions which may arise in connection with their specific liens before the ordinary tribunals of the country.

Mr. *Roxburgh* (who was desired to confine his reply to the argument, as to the inequality created amongst the creditors by the provision in the deed empowering the trustee to make arrangements with creditors, the amounts due to whom were respectively under 10*l.*) in reply.

With regard to the argument that this provision is contrary to the spirit of the act, and creates an inequality amongst the creditors, the answer is, that the language of the 192nd section of the Bankruptcy Act, 1861, in the seventh condition specified in that section, does not mean an equal distribution, necessarily, but a distribution according to the contract between the parties; as appears from the 197th section, which shows that the Legislature contemplated the case of a deed operating under these sections, although it may provide, that the distribution should be otherwise than as in bankruptcy. The introduction, therefore, of the clause, which is a contract between the parties, does not invalidate the deed, as one intended to operate under the 192nd section.

*The*

*The* LORD CHANCELLOR.

The only difficulty I feel is upon the clause providing for arrangements with creditors the amounts due to whom are respectively less than 10*l*. The power given to the trustee of paying the costs of creditors proceeding against the debtor for the recovery of the amounts due to them, I do not think objectionable. It might be the means of preserving the assets for equal distribution.

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Judgment reserved.

*The* LORD CHANCELLOR.

This was an objection to the validity of a trust deed, founded upon the circumstance that in the deed is a power given to the trustee of paying in full creditors under 10*l*. It is a power without any obligation to exercise it,—a power committed entirely to the discretion of the trustee. It was said, that to pay these creditors in full was at variance with the rule of administration in bankruptcy, and that, therefore, the deed was avoided. If it had been a trust, or absolute direction to pay, there might have been ground for the objection; but, inasmuch as the deed professes only to give liberty to the trustee, if the exercise of that liberty be at variance with the duty and obligation of the trustee, as declared by the rest of the deed and the law applicable to it, then the liberty, being repugnant to the higher duty, is simply a power which the trustee has no right to exercise. I must, therefore, hold that the power is no objection to the

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the validity of the deed; but that the power being repugnant to the duty of the trustee cannot be exercised by the trustee.

Much misapprehension has arisen with regard to these trust deeds, from not attending to the full effect and meaning of the 197th clause of the Act of 1861. There is, undoubtedly, some obscurity in the antecedent enactments of the section 192, arising in a great degree from amendments and alterations that were made in the language of the original bill; but, nevertheless, it is clear that the operation and effect of a trust deed, duly registered in conformity with the 192nd section, are defined with accuracy by the 197th section. If such a deed has been duly and completely registered under the 192nd section, that deed has the full operation and effect attributed to it by the 197th section, and it subjects the whole estate and effects of the debtor comprised in the deed to be applied for the benefit of his creditors; and the rights of the creditors are defined by and must be collected from the 197th section. Creditors, under a deed of trust, are put in the same position as that in which creditors under an adjudication are placed by the bankrupt law. Secured creditors therefore rank under the deed of trust for the amounts remaining after deduction of the value of their securities.

With regard to the doubt that has been suggested, whether the deed of trust affects the whole of the estate of the bankrupt, it is positively declared by the 197th section, that the creditors shall have the benefit in like manner as if the debtor had been adjudged a bankrupt; and that the trustees and the creditors shall in all matters relating to the estate and effects of such debtor (words which are used without any qualification or deduction)

tion) be subject to the jurisdiction of the Court of Bankruptcy, and shall have the benefit of the provisions of the act, in the same or like manner as if the debtor had been adjudged bankrupt and the trustees had been appointed assignees. Then follows a provision, that except the deed directs otherwise, with respect to jurisdiction, the Court in bankruptcy shall have plenary jurisdiction to decide every question. Now, that exception refers to what may very naturally be put into a deed, a proviso for questions being settled by arbitration. It may be also possible, that some different rule of administration may be adopted, as, for example, that there should be no distinction between joint and separate creditors; but the whole effect of this 197th section, if it be properly attended to, construed and appreciated, is to give to the deed the moment it attains the character of being a duly registered deed a comprehensive effect upon all the estate and effects of the debtor comprised in the deed, and the particular operation of making the position and relative rights of the trustees and creditors claiming under it the same as the rights of assignees and creditors under an adjudication in bankruptcy. This is still further exemplified by the 200th section: for where it is not competent to have a deed that shall answer entirely the requisites of the 192nd section, the model deed which is given by the schedule conveys all the estate and effects of the debtor in like manner as if he had become a bankrupt. It is further illustrated by the 198th section, which deprives the creditor, who has assented to the deed of trust, or is bound by the deed of trust, from having recourse to any process whatever against either the estate or the person of the debtor.

I am, therefore, of opinion in the present case, that the objection is not well founded. The deed of trust  
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states an intention to have the whole estate of the debtor administered as if it were a case of bankruptcy, and that the debts shall be paid to the creditors and all questions relating to the trust estate decided according to English bankrupt law. The particular power or liberty given to the trustee is, therefore, repugnant to and inconsistent with the general tenor of the deed, and with the enactments under which the deed now comes. I therefore hold, that that power cannot be exercised, and that it forms no objection to the validity of the deed and the capacity of registering it under the statute.



## Ex parte SAMUEL MENDEL.

1864.

Jan. 20.  
Feb. 10.Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

## In the Matter of JOHN MOOR'S ASSIGNMENT.

THIS was an appeal from an order of Mr. Commissioner *Ayrton*, of the Court of Bankruptcy for the *Leeds* district, rejecting a proof under a trust deed.

The 153rd section of the Act of 1861, providing for the admission of a proof when a bankrupt is, at the date of the adjudication, liable to a demand in the nature of damages which are unliquidated, only applies to cases in

*John Moor*, who was a seed crusher, entered on the 28th of *July*, 1862, into a contract with *Samuel Mendel* for the sale to him of ten tons of oil at 36s. 6d. per hundred weight, good iron bound casks included, to be delivered free to craft or trucks, during the month of *January*, 1863, and also into similar contracts with Mr. *Mendel*, for the sale and delivery to him of similar quantities of oil, during each of the months of *February*, *March*, *April*, *May*, and *June*, at prices specified in the contracts.

On

which the cause of action is complete before the adjudication.

The date of a trust deed in the form set out in schedule D. to the Act of 1861, is that of the supposed adjudication to which the 197th section refers.

On the 30th of *January*, 1863, Mr. *Moor* executed to the Respondents a deed of assignment for the benefit of his creditors, in the form given in schedule D. to the Bankruptcy Act, 1861 (*a*), and did not fulfil any of the contracts for the delivery of oil into which he had entered with Mr. *Mendel*. On the 26th of *February*, 1862, the deed was registered under the Bankruptcy Act, 1861, s. 192. Mr. *Mendel* claimed under the 153rd and 197th sections of the Bankruptcy Act, 1861, to be admitted to prove against the trust estate under the deed, in respect of unliquidated damages for the breach of Mr. *Moor's* contracts, deposing that he had been by the non-delivery of the oil compelled to purchase and had purchased other oil at prices which he stated, and that his consequent loss had been 1,646*l.* 16*s.* 6*d.* He now appealed from the rejection by the commissioner of the proof so tendered.

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Mr. *Daniel* (Mr. *Sargood* with him) for the Appellant.

The question is, whether, under the 153rd section of the Bankruptcy Act, 1861 (*b*), this is a proveable debt. The law as it stood previously to the passing of the Bankrupt Law Consolidation Act, 1849, was not sufficiently extended by the 178th section of that act, which provides

(*a*) See it and the other sections of the Bankruptcy Act, 1861, referred to in the arguments and judgment in the present case, stated above, pp. 8 *sqq.*, note, and in note (*b*) below.

(*b*) Which enacts as follows:—"If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court acting in

prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a Court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be proveable as if a debt due at the time of the bankruptcy: provided that, in case all necessary parties agree, the Court shall have power to assess such damages without the intervention of a jury or a reference to a Court of law."



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provides for the admission of proofs for contingent liabilities, and which came in question in *Ex parte Todd* (a) and *Ex parte Barwis* (b). The 153rd section of the present act was intended to comprehend cases such as arose in *Green v. Bicknell* (c), where a contract was broken before the bankruptcy, and also such as arose in *Boorman v. Nash* (d), where a contract was entered into before, but was broken after, the bankruptcy of one of the contractors. In neither of those cases was the demand held to have been proveable. The defect in the state of the existing law in this respect having been often complained of, it is presumable that the legislature in applying itself to the question of devising a remedy by the 153rd section of the Bankruptcy Act, 1861, meant that remedy to be full and complete. The presumption being in favour of a liberal construction of the provision, I submit that that presumption is not contravened by the language of the section. The statute does not require the demand to be in respect of a contract broken. Liability exists under a contract although it has not been broken, and the word "liable" should be construed to include demands actual or possible, present or future.

Again, the date of the supposed adjudication of bankruptcy in the 197th section is not, as the commissioner has assumed, the date of the execution of the deed, the 30th of *January*, 1863, but the date of its registration, the 26th of *February*, 1863. Otherwise, if it should be held that the present is not a case within the 153rd section, the Appellant will lose all benefit under the deed, and at the same time be debarred by the effect of the 199th section from taking other proceedings.

Mr.

- (a) 6 *De G., M. & G.* 744; 769; *S. C., De G., M. & G., S. C., De G., M. & G., Bcy. App.* 542, 549.  
*App.* 524. (c) 8 *Ad. & Ell.* 701.  
 (b) 6 *De G., M. & G.* 762, (d) 9 *B. & C.* 145.

Mr. *Bacon* and Mr. *De Gez* for the Respondents, the trustees of the deed of assignment.

The object of the provision appears clearly from its terms. It was to remove the objection arising from the damages not being liquidated, not that arising from their not having been incurred. When the legislature has attempted to provide for the proof of future or contingent demands, it has accompanied the provision with machinery for the purpose of doing justice to other claimants, and prevent the administration of the assets being delayed by the newly introduced species of proof. Thus, when future debts were first made proveable, a rebate was directed to be made; next, when contingent debts were introduced by the 6 *Geo.* 4, c. 16, s. 56, which was repeated in the 177th section of the Bankrupt Law Consolidation Act, 1849, a provision for valuation was also introduced, which now forms part of the last-mentioned section, and so essential a part was the machinery considered of the provision, that contingent debts not capable of being valued were at first held not proveable. Although that was not followed, yet *In re Gales(a)*, and the cases there referred to, show with what care the provision was applied. The contingent liability clause of the act of 1849 (s. 178) is also framed so as to exclude indefinite claims by authorising the Court to expunge a claim not matured into a proof within six months. If the Appellant is right, a claim in respect of a contingent unliquidated liability would be retained, when one for a contingent liquidated liability might not. The Lord Chief Baron said in one case, that less mischief would arise from repealing than from extending provisions of this kind. The section in the present act contains no such machinery or safeguard. The result of construing it as the Appellant contends would be that the trustees or assignees would hasten to make

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(a) *De Gez*, 100.

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make a distribution for the purpose of shutting out possible unliquidated claims, so that the possible claimant would be the first and most frequent sufferer : for, his demand being proveable, it would be barred by the order of discharge, and yet he would get no part of the assets ; for the effect of the order of discharge does not and could not be made to depend on the existence of assets at the time when the damage actually occurred. No contractor can be said to be "liable" within the meaning of the section until a breach of the contract ; and this reasonable interpretation is supported by a consideration of the object of a bankruptcy and of a trust deed, viz., a present distribution of the balance of the debtor's assets amongst existing creditors. Whereas, if the construction submitted on behalf of the Appellant is correct, no distribution could take place for an indefinite period. On the second point, we submit that the Commissioner is also right in the view which he has taken of the date to be attributed to the supposed adjudication of bankruptcy. The language of the statutory form of deed settles this. It is "as if he had been adjudicated bankrupt at the date hereof," nor is this at all inconsistent with any other part of the act. It would be impossible to make the affidavit required by the 5th condition specified in the 192nd section prospectively and with a reference to what might be the state of circumstances at the time of the registration of the deed, or consequently to know what ad valorem stamp the deed must, under the 4th condition previously to being produced and left for registration at the office of the chief registrar, have been impressed with or have had affixed to it. [The LORD CHANCELLOR : Resort has not apparently in the present case been had to the statutory form of deed, by reason of the existence of the circumstances under which the 200th section requires that form to be used.] That does not appear. But as the form is given in the  
schedule

schedule to the act, it must be assumed not to be contrary to the provisions of the act itself, and its language is distinct and unequivocal.

Mr. *Daniel* in reply.

Judgment reserved.

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*The* LORD CHANCELLOR (after stating the nature of the case and the alteration of the law made by the section) proceeded as follows :—

Feb. 10.

The learned Commissioner appears to have thought that the construction which he has put upon the section was not according to the intention of the framers of it. I do not agree in that opinion. But I agree in thinking that, according to the true construction of the Act, and, I think that, according to the intention of its framers, demands of this nature should be limited to cases in which the cause of action is complete at the time of the adjudication, and that consequently the 153rd section only applies to such demands in the nature of damages as are capable of being enforced against the bankrupt at the date of the adjudication.

In this case there has been no bankruptcy but a trust deed in the form given by one of the schedules to the Act, and I think that the date of the deed is by the Act rendered equivalent to that of an adjudication of bankruptcy. The question therefore is, whether the debtor in this case was at the date of the deed liable by reason of any contract or promise to a demand in the nature of damages. Now the contract might be performed at any time during the month of *January*. The date of the deed was the 30th of *January*, so that at the date of the deed there was an interval of time during which the debtor

1864.

Ex parte  
MENDEL.In re  
MOOR'S  
ASSIGNMENT.

debtor might have delivered the oil. I am unable to say that the debtor was, at the date of the deed, liable by reason of any contract or promise to a demand in the nature of damages. And I agree with the argument which has been addressed to me, that it would not be desirable, if it were possible, by construction to extend this interpretation of the statute; for then it would be very difficult to define the limit to which it might be extended, and great confusion would be introduced into the administration of the law of bankruptcy by the admission of new demands arising at indefinite periods subsequent to the adjudication. It was argued ingeniously enough by Mr. *Daniel*, in opposition to the argument as to the date of the deed being equivalent to that of the adjudication, that inasmuch as, if the Appellant had filed a petition for adjudication subsequent to the date of the trust deed, but before the expiration of the time for its registration under the 192nd section, his petition would, by the operation of the 199th section, when the deed was so registered, have been dismissed, it must be inferred that a creditor who was thus deprived of his remedy must have been intended to be admitted under the trust deed. But I think that no such consequence follows. The 199th section no doubt protects the trust deed from being upset by an adjudication between its date and its registration. But the remedies of creditors are left in other respects untouched, and the remedy of the present Appellant will remain, subject to this observation, that by reason of this enactment he is unable to interfere with the validity of the trust deed. I think, therefore, that no such inference can be drawn from the 199th section as would warrant any other construction of the 163rd section than that which the Commissioner has put upon it, and of which I entirely approve. I affirm the Commissioner's order and dismiss the appeal with costs.

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Ex parte ARCHIBALD COCKBURN, HENRY  
SMITHES and JOHN BLACK.

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Nov. 11, 12, 18.  
Dec. 12.

In the Matter of JOHN BENJAMIN SMITH and  
THOMAS LAXTON, Bankrupts.

1864.  
Mar. 5.  
Apr. 13.

**T**HIS was an appeal from an order of Mr. Commissioner *Fane* annulling a joint adjudication of bankruptcy against the Respondents *John Benjamin Smith* and *Thomas Laxton*, on the ground of their having respectively executed deeds of composition with their respective creditors.

Before *The Lord Chancellor* LORD WESTBURY.

To the validity, under the Bankruptcy Act, 1861, s. 192, of a composition deed executed by a single member of a dissolved firm after the dissolution, objection was taken on the part of

Messrs. *Smith & Laxton* had carried on business in partnership as wine merchants, and during the subsistence of this partnership, viz.:—on the 10th of *November*,

creditors of the firm, on the ground that the joint creditors were insufficiently represented in the computation of the majority of assenting creditors required by the statute. *Held*, that the objection could not be entertained in the absence of evidence showing the existence of joint estate at the date of the execution of the deed, and that the onus lay upon the objectors to produce such evidence.

An assignment of a debtor's estate and effects is not necessary for the validity of a composition deed under the 192nd section of the Bankruptcy Act, 1861, but to render such a deed binding on non-assentients, they must stand under the deed in the same situation and with the same advantages as the assentients.

A composition deed purported to be made between a debtor of the first part, certain creditors whose names and seals with the amounts of their debts were set forth in a schedule and who executed the deed of the second part, and all other (if any) the creditors of the debtor of the third part. It recited that the executing creditors had agreed to accept a composition of three pence in the pound on their debts and to release the debtor. It witnessed, that in consideration of the composition paid to the executing creditors and of the covenant thereafter mentioned, the executing creditors released the debtor from the debts placed opposite to their names. It further witnessed, that the debtor covenanted with the parties of the second and third parts to pay on demand to all his creditors the above composition unless it should have been already paid. *Held*, that the deed placed the assentients and non-assentients in a position of undue inequality, and that on this ground the deed was not binding on the latter.

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November, 1862, they had become jointly indebted on their acceptance at six months' date to the Appellants Messrs. *Cockburn & Company* in a sum of 195*l.* 3*s.*

The partnership was dissolved in *November*, 1862, and on the acceptance arriving at maturity on the 13th of *May*, 1863, it was dishonoured.

On the 19th of *May*, 1863, a trader debtor summons was served on behalf of the Appellants upon the Respondents, and resulted in the commission of acts of bankruptcy on the part of the latter on the 24th of *June*, 1863, by reason of their failing to pay, secure or compound for the amount of the debt which had been admitted by them on the 7th of the same month.

In the interval between the 7th and the 24th of *June* (viz. on the 22nd) the Respondent *John Benjamin Smith* executed a deed, which was in the following terms:—

“This indenture made the 23rd day of *June*, 1863, between *John Benjamin Smith*, of &c., of the first part, the several persons whose names and seals are hereunto subscribed and set in the schedule hereunder written (being severally creditors in their own right or in co-partnership of the said *John Benjamin Smith*) of the second part, and all other (if any) the creditors of the said *John Benjamin Smith* of the third part: Whereas the said *John Benjamin Smith* is indebted to the said several persons parties hereto of the second part and to other persons in divers sums of money, and being unable to pay his said debts in full, has proposed to pay unto the whole of his creditors a composition of three pence in the pound on the amount of their respective debts: And whereas the said several persons whose names and seals are hereunto subscribed and set have agreed to accept the said composition and to release the said *John Benjamin Smith* from their respective debts,

debts, and from all other sums of money (if any) which are now due and owing from him to them respectively or to them and their respective partners: Now this indenture witnesseth, that in pursuance of the said agreement and in consideration of the composition of three pence in the one pound on the amount of their respective debts (as mentioned in the said schedule) in hand well and truly paid by the said *John Benjamin Smith* to the said several persons parties hereto of the second part respectively, the receipt whereof they do hereby respectively admit and acknowledge and of and from the payment thereof do and each of them doth hereby respectively acquit, release and for ever discharge the said *John Benjamin Smith*, his heirs, executors and administrators, and also in consideration of the covenant hereinafter contained by or on the part of the said *John Benjamin Smith* they the said parties hereto of the second part for themselves severally and respectively, and for their several and respective executors or administrators, partners and assigns, but every of them so far only as concerns his own respective acts and deeds and the respective acts and deeds of his own respective executors, administrators, partners and assigns, their and every of their executors and administrators, and not further or otherwise, do and each of them doth hereby acquit, release and for ever discharge the said *John Benjamin Smith*, his heirs, executors and administrators, and his and their present and future lands, tenements, goods, chattels and effects, of and from the payment of the sums of money set opposite their respective names or the names of their respective firms in the said schedule and of and from all other sums of money (if any) which at the time of the sealing and delivery of these presents (the same being sealed and delivered on or after the date of these presents) by the said parties hereto of the second part is or are due or owing by the said

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*John Benjamin Smith* to them respectively, or to them and their respective partners, and of and from all and all manner of actions, suits, cause and causes of actions, debts, accounts, bonds, covenants, judgments, executions, claims and demands whatsoever both at law and in equity which they the said parties hereto of the second part, or any of them, their or any of their heirs, executors, administrators, partners or assigns, or any person or persons claiming by, from, through, under or in trust for them, or any of them, now have or hath or hereafter can, shall or may have, claim or demand against the said *John Benjamin Smith*, his executors or administrators for or on account of any such sum or sums of money as aforesaid, or any cause, matter or thing in anywise relating thereto: And the said *John Benjamin Smith* for and in consideration of the premises doth hereby for himself, his heirs, executors and administrators covenant, promise and agree with and to the said several parties hereto of the second and third parts and their respective executors, administrators and assigns, that he the said *John Benjamin Smith*, his executors or administrators shall and will upon demand well and truly pay unto all and singular the existing creditors of him the said *John Benjamin Smith* (including the said parties hereto of the second part, unless the same shall have been paid to them on the day of the date of these presents), or their respective executors, administrators or assigns a composition of three pence in the one pound on the amount of the respective debts or sums of money now due and owing by him (either alone or jointly with any other person or persons) to them respectively. In witness," &c.

On the 23rd of *June* the Respondent *Thomas Laxton* also had executed a deed, which mutatis mutandis was identical in terms with that executed by *Smith*. The two deeds were left for registration on the 30th of *June*,  
and

and the certificate of registration was given on the 1st of *July*, on which day also the Appellants issued a joint petition in bankruptcy against the Respondents, under which they were adjudged bankrupts.

On the 31st of *August*, 1863, the Commissioner, upon the application of the Respondents, and upon having the composition deeds produced to him, made the order under appeal annulling the adjudication.

It appeared from the account delivered to the Chief Registrar, in obedience to the General Order in Bankruptcy of 22nd *May*, 1862, with *Smith's* deed, that the aggregate amount of his liabilities was 35,764*l.* 10*s.* 9*d.*, three-fourths of which sum was 26,823*l.* 8*s.* 0½*d.* The number of creditors was forty-one, of whom twenty-five were stated to be assenting creditors, with an amount of debts to the value of 29,283*l.* 12*s.* 1*d.*; but among these were placed the names of Messrs. *Overend, Gurney & Company* for 20,000*l.*, whose names were also placed in the schedule to the deed as creditors for that amount, but with the marginal note "subject to all necessary consents."

*Smith*, in his affidavit as to the requisite majority having been obtained, deposed that the deed had "been executed or in writing assented to or approved of by a majority in number representing three-fourths in value of the creditors of me the said *John Benjamin Smith*, whose debts amount to 10*l.* and upwards;" and that he believed that the amount of the composition to be distributed under the deed was 447*l.* 1*s.*

In *Laxton's* case the facts were similar, the aggregate amount of liabilities being stated as 27,196*l.* 8*s.* 4*d.*, three-fourths of which was 20,397*l.* 6*s.* 3*d.*; the number of creditors eighteen; ten assenting with debts equal to

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an aggregate in value of 22,997*l.* 4*s.* 1*d.*, amongst whom Messrs. *Overend, Gurney & Co.* were reckoned as creditors for 20,000*l.*, for which sum they had signed the schedule of the deed with the same reservation as in *Smith's* case; and the affidavit of *Laxton* being couched in the same language as that of *Smith*, except that the amount of the composition to be divided was calculated to be 338*l.* 14*s.*

There was no evidence as to any material facts other than that above stated.

Mr. *Druce* for the Appellants.

These deeds have not received such a majority of assents of the nature contemplated by the 192nd section of the Bankruptcy Act, 1861, when properly construed, as to bring them within the protection of that section. For the adjudication of bankruptcy against the Respondents being joint, the deeds to have had the effect attributed to them by the Commissioner should have been each in writing assented to or approved of by a majority in number representing three-fourths in value of the joint creditors of the Respondents. It is true that the partnership between the latter had been dissolved. Still it was not competent for each of them as an individual after the dissolution of that partnership to bind non-assenting joint creditors by the execution of deeds carrying into effect arrangements entered into with the separate creditors of either Respondent only. The principle involved in allowing a majority of creditors to bind a minority would be violated, unless the majority and minority each belonged to the same class of creditors. Had either of the Respondents executed a trust deed on one day and the other executed a trust deed on the following day, the joint and separate estates would have been duly administered. Had it been a case of bankruptcy the two petitions

petitions would have been consolidated with a similar result. But in cases of composition the case is otherwise. The debtor in those cases is freed from his liabilities from the moment when the deed has fulfilled the statutory requirements, and in the present instances that freedom is purchased, so far as it is obtained from others than assenting creditors, in consideration of a mere personal covenant. It is perhaps too late after the dicta in *Ex parte Rawlings*(a) and *Ex parte Godden*(b), to argue against the validity of a deed of composition as a deed of the nature contemplated by and within the protection of the statute; but, assuming that validity, greater vigilance is required than perhaps would be required in the case of a trust deed to prevent grievous wrong being done. Otherwise a case might arise of this nature:—a firm consisting of two partners might be under liabilities, as also might be each of the two partners composing the firm. The joint assets might produce nineteen shillings and six pence in the pound, and the liabilities of the partners and the firm be so circumstanced that the separate creditors of either debtor might be sufficient to satisfy the statutory requirements as to majority. Then, if the view sanctioned by the Commissioner is correct, it would be quite possible for the separate creditors to appropriate, as in the present case, to themselves the bulk of the joint assets, and so defeat the just claims of the joint creditors. Or a case might arise where the parts would be changed, and an overwhelming majority of joint creditors might in like manner defraud the separate creditors.

But, irrespectively of the consideration of results, the language of the act when properly construed is susceptible of no serious doubt.

✦ The

(a) *Supra*, p. 1.

(b) *Supra*, p. 36.

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The act is in terms drawn in the singular number, and is therefore to a certain extent elastic. The words "his creditors" in the 192nd section mean, I submit, when the case is one of a debtor engaged with another in partnership, "all his creditors." The words "the creditors of such debtor" in the first condition specified in that section, mean when applied to the case of an insolvent firm, "the joint creditors." The seventh condition is inapplicable, as has been decided, to the case of a composition deed. The words "in case any petition shall be presented for an adjudication in bankruptcy against a debtor after his execution of such deed or instrument as is heretofore described" in the 199th section, upon which the Commissioner proceeded in the present case, when adapted to the case of partners, must be read as "in case any petition shall be presented for an adjudication against the joint debtors after the execution by them of a deed executed or in writing assented to or approved of by a majority in number representing three-fourths in value of the joint creditors." The principle of the case of *Ex parte Godden* (a), where the question arose with reference to the assents of secured creditors, is not inapplicable to the present.

[*The LORD CHANCELLOR.*

I expressed an opinion in *Ex parte Morgan* (b), that creditors under a trust deed are placed *in eodem statu* with creditors under a bankruptcy, and that as the latter cannot prove without allowing for the value of their securities, the former are subjected to the same obligation. Upon this principle you would take the value of such debts after deducting the value of securities in the hands of creditors.]

Mr.

(a) *Supra*, p. 36.

(b) *Supra*, p. 64.

Mr. Druce. *Ex parte Morgan* was the case of a trust deed to which the principle of a valuation of securities may have a proper application, but it can have none to the case of composition deeds, and in the present cases the composition of three pence in the pound is offered to creditors secured and unsecured alike. In *Ex parte Spyer (a)*, where a power to pay creditors under 10*l.* in full was held to be incapable of being exercised, an opinion was intimated that had there been a trust or an absolute direction for that purpose the case would have been different. That seems to point to the validity of such a deed only as provides for a distribution in accordance with the bankrupt law. The decision in *Ex parte Godden* was intended to obviate the startling results which would have followed from a contrary decision. And if it be true that the assent of all the creditors is necessary, there must be a majority of each class in order to bind the creditors of that class. In the present case, notwithstanding that the onus is upon the Respondents of making out these facts, they have offered no further proof than their respective affidavits—which are copied servilely from the common form, instead of being extended, together with the language of the statute, to the circumstances of the particular case—to show that the requisite majority of joint creditors has executed or in writing assented to or approved of either of the deeds. • The language of the affidavits is insufficient to raise even *primâ facie* proof to that fact.

So, again, the certificates of registration of these deeds being, according to the decisions in *Ex parte Page (b)* and *Ex parte Spyer*, nothing more than *primâ facie* evidence

(a) *Supra*, p. 94.

(b) *Supra*, p. 59.

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evidence of the fulfilment of the statutory requisitions, it might be argued, although I do not press the point, that there is nothing to show that the assents of Messrs. *Overend, Gurney & Co.* to the deeds were given otherwise than conditionally. Those creditors actually appear in the schedule to each deed as creditors for the same debt, 20,000*l.*, and in the case of the Respondent *Laxton's* deed even the Appellants are scheduled in the account delivered to the Chief Registrar for their debt. For all these reasons the present appeal ought to be allowed.

Mr. *Bacon* and Mr. *Sargood*, for the Respondents, were stopped by the Court.

*The LORD CHANCELLOR.*

Two traders, Messrs. *Smith & Laxton*, were wine merchants in partnership together, a partnership which lasted till *November*, 1862. Upon the evidence it is not clear when that partnership was dissolved, but it was on some day after the bill of exchange was given to the Appellants, the petitioning creditors. From and after the date of the dissolution, of course, the joint property, if there was any, of these partners might have been divided and distributed between them, and there might have been a total annihilation of the joint property of the partnership.

The argument on behalf of the Appellants has proceeded on the great inconvenience which would ensue if the provisions of the statute were to be held to apply to all creditors, joint and separate, without distinction; and it is argued that the word "creditors" ought to be taken as indicating the several classes of creditors, and that

that the words of the statute ought to be taken distributively as to the majority in number and value of each class, the object being to show, that unless there is a majority of each class assenting, the provisions of the statute have not been sufficiently complied with, and the result being represented to be, that by a skilful union on the part of the separate creditors, the joint estate might be rendered distributable amongst the separate creditors.

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But, on the other hand, if there be no joint estate, the assets will be distributed *pari passu* amongst all the creditors, joint and separate. In that case the joint creditors are not distinguished from the separate creditors, and have the right of proving against each estate.

I am obliged, in the present case, to assume that there is no joint estate. It lies at the very root of this objection that there should be a joint estate. Had there been any, its existence would, no doubt, have been proved.

On the assumption, therefore, that there is no joint estate, the joint and separate creditors are not distinguishable in any respect, and *primâ facie* evidence is adduced showing the existence, in the present case, of the assents of the requisite statutory majorities in number and value of the creditors to these deeds.

So far, therefore, as the objections pressed upon me go, these deeds are not wanting in validity.

It was competent indeed to the Appellants to show that the majorities actually obtained were in fact insufficient,



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cient, because the evidence adduced before the Registrar was *prima facie* only; but this they have not done.

The learned Commissioner has, in my judgment, arrived at a correct conclusion. The appeal must be dismissed, and with costs.

---

[Nov. 12.

On this day the Lord Chancellor desired that the case should be re-argued with reference to the frame of the deeds, and as to their being as favourable to absent creditors as to those creditors who were named, and especially with reference to the question whether creditors who were not named in and did not execute or in writing assent to or approve of them could sue upon the covenants contained in them, or might be obliged to prove the amounts due to them respectively before admission as creditors under the deeds.

---

Nov. 18.

The case accordingly now came on to be re-argued upon these points.

Mr. *Druce* for the Appellants.

Neither of these deeds can be held to be within the protection of the 192nd and following sections of the Bankruptcy Act, 1861. It is a rule of law well settled by decision that no one who is not a party to a deed expressed to be made between parties can sue upon it; *Gilby v. Copley* (a); *Metcalfe v. Rycroft* (b); *Berkeley v. Hardy* (c). This rule is recognized and remedied—  
 but

(a) 3 *Levinz*, 138.

(b) 6 *M. & S.* 75.

(c) 5 *B. & C.* 355.

but only in one particular, for the present purpose immaterial—by the legislative enactment contained in the 8 & 9 *Vict.* c. 106, s. 5. No creditor therefore of these debtors who is not actually a party to these deeds of the second part,—that is to say, no creditor, whom as a non-assenting creditor it is sought to bind by these deeds merely by the terms of the act of parliament—can sue upon them.

Even assuming that there would be on no other ground any objection to an unnamed creditor suing on the deed, the very want of the name leaves a patent ambiguity, to remove which parol evidence is inadmissible.

And supposing that both these objections could be removed, the burthen of adducing such evidence and the want of an estoppel, in the case of unnamed creditors, against their status as creditors being altogether denied, which might render in their case long litigation necessary to establish their claim, places them at such a disadvantage and creates such inequality as would alone be enough to invalidate the deeds.

Even assuming the Court to be against me upon these points, the deeds are bad, inasmuch as their benefits are not accorded with an even hand to the creditors who are parties to them of the second part, and to the creditors who do not assent to them. The former receive their composition dividend at once and release the debtors. The latter are remitted to the shadowy benefit of an insolvent's covenant to pay a composition dividend at the same rate at a future day. A mere covenant to pay a composition cannot, I submit, in any case be a composition with creditors of the nature contemplated by the Act. Of that opinion seems to have been the Court of Exchequer

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Exchequer in *Walter v. Adcock* (a), and although it may now be too late to argue that a cession of all a compounding debtor's property is requisite, still there must be actual payment or some substantial security in order to validate a proposed composition arrangement as one within the range of the 192nd section of the Act. If less will suffice, a fraudulent debtor with assets sufficient to produce ten shillings in the pound might enter into an arrangement in the manner pursued in the deeds now before the Court for payment of a composition dividend of twelve shillings and six pence in the pound. His favoured creditors who are admitted to execute the deed might receive their full composition dividend at that rate upon execution; the result being that for the payment of non-executing creditors, whose remedy would be under a covenant for payment of the twelve shillings and six pence in the pound at a future day, the remaining assets would not suffice.

Moreover, as these deeds are framed the debtors will obtain no release from such of their respective creditors as will be only by virtue of the Act bound by them. The execution of the respective deeds by the majority of creditors required by the statute, although it may by virtue of the Act bind a non-assenting minority, will not, as appears from the principle deducible from *Ex parte Morgan* (b), make them actually executing parties of the respective deeds of the second part, who alone by their terms are releasing parties. The recitals show that it is because the persons made parties to the respective deeds of the second part have agreed to the respective arrangements that they are so made parties. Into this category the Appellants, who are not among such parties, have not agreed to the arrangement, and will execute no release,

(a). 7 H. & N. 541

(b) *Supra*, p. 64.

release, cannot by construction of the Act be said to be brought, even had not the point been rendered clear by the distribution of the creditors into different classes in the deeds themselves. Again, it is clear that under the Bankruptcy Act, s. 192, no deed was intended to be in itself a final bar to proceedings on the part of non-assenting creditors until the due fulfilment by the debtor of all obligations imposed upon him by the deed. This appears from the reservation of process given by the 198th section against a debtor who seeks to depart out of *England*.

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If there had been a trustee appointed by the deed and the aggregate amount of the composition dividend had been placed in his hands for the benefit of all the debtor's creditors, that might have had the effect of placing all his creditors in a similar position, and have met the suggestion thrown out by the Lord Chief Baron and Mr. Baron *Martin* in *Walter v. Adcock*, that some property must be dealt with in the arrangement.

Mr. *Bacon* and Mr. *Sargood* for the Respondents.

The objection founded on the common law authorities cited on the other side, that the arrangement being worked out through the medium of indentures, the creditors should have been but are not actually named as parties to the deed, is an objection analogous to and equally futile with a demurrer or plea to a declaration on the ground of the Plaintiff not having proved his own identity. It is sufficiently answered by the fact of the practical impossibility of inserting the names of all those creditors who do not execute in a separate schedule.—

[*The LORD CHANCELLOR*: Does not the word composition in the ideas which it suggests involve knowledge on the part of the debtor of all his creditors and of the amount

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amount of his debts?]

—Not of his creditors, for he may not know in whose hands bills of exchange or promissory notes may be. It may be impossible to name every creditor in the deed, and the Act does not require as a condition to the validity of a deed that the debtor should know or remember with perfect accuracy and set forth the name and debt of every creditor. As to the distinction between the creditors of the second and third parts, which is made an objection, it is one created not by the debtors but by the circumstances of the case. Had there been no covenant to pay such creditors as did not execute the deed, the Appellants might have had just cause of complaint; but the deed must be held to be within the protection of the 192nd section of the Act, unless any creditor can show an unfair or unnecessary inequality created amongst the creditors under it, which is not the case here. To an actual payment there must be two voluntary parties. What more can a debtor do than covenant to pay such of his creditors as refuse actual payment? Under these deeds it is at the option of any creditor to accede or not. In the event of his adopting the one course, he becomes a party of the second part and has the benefit of the actual payment; in the event of his adopting the other, he has the benefit of the debtor's covenant. The words "in consideration of the payment and covenant" with which the releases in these deeds are respectively prefaced are mere surplusage. The possible frauds which it has been suggested might result if a covenant for payment should be held a sufficient compliance with the provisions of the act with respect to composition deeds would if perpetrated bear their fruits in the exposure of the debtor to a consequent indictment, to say nothing of the jurisdiction given, as we submit, by the 197th section to the Commissioner to deal with the matter in case of failure on the part of the debtor in the observance

servance of the obligations imposed upon him by the deed, and even to proceed to an adjudication of bankruptcy against him. But be that as it may the possibility of fraud cannot invalidate the deed, if it be in fact a deed of the nature contemplated by the act.

[*The LORD CHANCELLOR*: Why might not the composition dividends of non-assentients be made payable to a trustee?—The act does not contemplate or require the interposition of a trustee, for whose solvency indeed there would be no guarantee whatever. The decisions up to the present time have proceeded on the ground that deeds of this nature must be for the equal benefit of all the creditors. The act provided that such deeds are upon the fulfilment of the statutory provisions to be read as if every one of the debtor's creditors had been party to and actually executed them. If the deeds in the present case had been so executed, every creditor would have actually received his composition dividend.

Mr. *Druce* in reply.

Judgment reserved.

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*The LORD CHANCELLOR.*

Dec. 12.

In this case I am desired to hold that two deeds of composition and release, executed one by *John Benjamin Smith* and the other by *Thomas Laxton*, are not binding on creditors who have not executed or assented to them, and therefore that the deeds have not been duly registered under the 192nd and subsequent sections of the Bankruptcy Act of 1861.

These deeds of release do not contain any assignment or make any surrender of the estate and effects of the  
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debtors. But it is in my opinion well settled, and is the clear intent of the Bankruptcy Act, 1861, that an assignment or surrender of the debtor's estate is not necessary for the validity of a deed of composition or release under the 192nd section.

The provisions of the Act appear to have been intended to prevent the necessity of breaking up in every case a debtor's business, or bringing his property to a forced sale. The legislature appears to have supposed, and I think with reason, that in many cases the power of escaping this necessity might lead to results more beneficial to the creditors than would follow from the breaking up of the debtor. But to render a deed of composition and release binding on the minority of the creditors, who have not executed or assented to or approved of it in writing, it is necessary that the non-assenting creditors should stand under the deed in the same situation and with the same advantages as the creditors forming the majority. The 192nd section enacts that the creditors who have not assented are to be bound "as if they were parties to and had duly executed the deed." It follows that the provisions of the deed must be such as will apply to all the creditors equally and without distinction or difference.

To apply these rules to the deeds in question (each of which is a counterpart of the other), and taking *Laxton's* deed as an example, I find that it is made between *Laxton* of the first part and the several creditors whose names and seals are subscribed and set in the schedule thereunder written (being severally creditors in their own right or in co-partnership of *Laxton*) of the second part, and all other (if any) the creditors of *Laxton* of the third part. In the schedule are included the names and debts of various creditors, some of whom have  
signed

signed and sealed the deed and others who have neither executed nor assented to or approved of the deed. It appears also from the account of debts which in conformity with the regulations was produced to the registrar when the deed was left for registration, and which is verified by affidavit, that there are several other creditors whose names do not appear at all in the schedules to the deeds, and that the number of creditors in each case who have neither assented to nor approved of the deeds is considerable, in *Smith's* case amounting to sixteen.

A distinction is thus drawn between those of the creditors named in the schedule who have not executed the deed and those who have executed, and further, a distinction is drawn between the creditors who have not executed, but are named in the schedule, and those who are not so named. The deed recites to the effect that *Laxton* had proposed to pay to the whole of his creditors a composition of three pence in the pound, and that the several persons whose names and seals were thereunto subscribed and set had agreed to accept the composition, and to release *Laxton* from their respective debts; and it is witnessed, that in pursuance of the recited agreement, and in consideration of the composition of three pence in the pound on the amount of their respective debts, as mentioned in the schedule, in hand well and truly paid by *Laxton* to the several persons parties of the second part, and also in consideration of the covenant by *Laxton* thereafter contained, the parties of the second part did thereby acquit, release and discharge *Laxton*, his heirs, executors and administrators and his and their estate and effects from all the sums of money set opposite to their respective names or firms in the schedule, and from all sums of money (if any) which at the time of the execution of the deed by the several parties thereto of the second part were due and owing

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by

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by *Laxton* to them respectively or to them and their respective partners and from all and all manner of actions, and so on, following [the words of a general release; and *Laxton* for and in consideration of the premises did thereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the several parties thereto of the second and third parts, that he *Laxton* would on demand pay unto all and singular the existing creditors of *Laxton*, including the parties thereto of the second part (unless the same should have been paid to them on the day of the date of the deed), a composition of three pence in the pound on the amount of their respective debts then due and owing by *Laxton* either alone or jointly with any other person or persons to them respectively.

It appears from this statement of the deed that the creditors who have not executed the deed and those who are not named in the schedule, are placed by the deed in a situation very inferior to that of the majority of the creditors. To the latter the composition is paid down in hand, whereas the former have to rely upon the covenant.

But further, it is clear that the creditors who have not executed the deed could not sue upon the covenant of the debtor. The covenant is with the parties to the deed of the second and third parts, and as the deed is between parties, no person who is not a party could sue upon the covenant (a). This clearly follows from the settled principles of law, which are illustrated by the cases cited in the argument.

Again—

(a) It has been since held 4 H. & C. 28; L. R. 1 Exch.—  
that a general description is 112; *Reeves v. Watts*, L. R.—  
sufficient to make the creditors 1 Q. B. 412.  
parties. See *Gresty v. Gibson*,

Again, the creditors whose names and debts are not set forth in the schedule are under a great disadvantage in this respect, namely, that there is no admission by the debtor of the debts due to them respectively. Even, therefore, if any one of such creditors could now come in and execute the deed and sue upon the covenant, he would be under the necessity of proving the fact and amount of his debt. But the deed to be binding must be complete at the time it is registered, and it cannot be subsequently executed by any creditor who had not previously assented to or approved of it in writing. Therefore it is plain that there are several creditors in each case who are in a situation of great disadvantage.

The deeds have been framed in an imperfect manner. If the names and debts of all the creditors who are not parties to or have not assented in writing to the deeds had been included in distinct schedules written under the deeds, and the amount of the composition on such last-mentioned debts had been deposited in a bank or with a trustee for such last-mentioned creditors respectively, with directions to pay the amount on demand, and if the debtors had also respectively covenanted with the persons named in such schedules, that they or the trustees respectively should and would pay such composition on demand, it might perhaps have been reasonably contended that all the creditors were, as far as possible, placed in a situation of equality.

The power given by the act to a certain majority of creditors to bind, and in fact to release, the debts of the minority, in cases where there is no *cessio bonorum*, is no doubt a great and extraordinary power. It of course rests on the assumption, that terms which so large a proportion of creditors, both in number and value, are willing to accept from an insolvent, must be advantageous to

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to the whole body of creditors, and this assumption necessarily implies that the terms agreed to are the same for all, and that those who bind and those who are bound are in a situation of equality. Where this is not the case, it seems to me that non-assenting creditors are not bound according to the true intent and meaning of the statute.

I must, therefore, declare that these deeds of composition are not binding on the creditors who are not parties or have not assented thereto, and that the order of the Commissioner annulling the adjudication, which is founded on these deeds of composition, must be discharged.

1864.  
 March 5.

On this day the whole case came on again to be re-argued by permission of the LORD CHANCELLOR, his Lordship's attention having been called, subsequently to the delivery of the foregoing judgment, to the fact that in reality it had been too hastily assumed on former occasions that as the deeds executed by *Smith* and *Laxton* respectively so also the circumstances of their respective creditors were the same; whereas in reality they differed thus, that the state of circumstances relative to creditors, supposed in the foregoing judgment to exist in *Laxton's* case, actually existed in the case of *Smith* only, there being in the case of *Laxton* two classes of creditors only, namely, those who had executed the deed, and those who were named and described in the schedule but had not executed it.

Mr. *Druce* for the Appellants.

Mr. *Bacon* and Mr. *Sargood* for the Respondents.

In addition to the authorities cited on previous occasions,

sions, reference was made to *Ex parte Ruffin* (a); *Ilderton v. Jewell* (b); *The Bankrupt Law Consolidation Act*, 1849, s. 97; *The Bankruptcy Act*, 1861, ss. 192, *sqq.*

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Mr. *Druce* replied.

Judgment reserved.

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*The* LORD CHANCELLOR.

*April* 13.

In this case a re-argument was directed in consequence of it having been stated to me that there was an error in the statement of the facts of the case in my former judgment.

There are two deeds of composition and release, one executed by Mr. *Smith*, the other by Mr. *Laxton*. *Smith* and *Laxton* were partners. It was originally stated to me that the deeds were perfectly alike, being in fact counterparts one of the other. I assumed, therefore, that the circumstances as to the creditors were the same in both cases.

In *Smith's* case I find three separate classes or divisions of creditors; first, creditors who had executed the deed; secondly, certain creditors who were named in the schedule to the deed but had not executed it; thirdly, certain creditors included in the account of debts brought into the Registrar's office, but who had neither executed the deed nor were included in the schedule.

I assumed in my former judgment that the same state of facts existed as to *Laxton's* deed; but this was a mistake. In *Laxton's* case there are only two classes of creditors,

(a) 6 *Ves.* 119.

(b) 16 *C. B. (N. S.)* 142.

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creditors, those who have executed the deed, and those who are named and described in the schedule, but have not executed it.

I willingly permitted the whole case to be re-argued; but there was in fact no ground for change of my opinion with respect to the case of *Smith*. The question therefore is, whether there should be any alteration in my judgment with respect to the case of *Laxton*.

The insufficiency of *Laxton's* deed arises entirely from the form of its construction. The creditors are divided into two classes upon the face of the deed, those who have executed it, and those who have not executed it. The latter are not in any way named or described in the deed. It is expressed to be made between *Laxton* of the first part, the several persons whose names and seals are thereunto written, being severally creditors in their own right or in co-partnership of *Laxton*, of the second part, and all other (if any) the creditors of *Laxton* of the third part.

There are only three references to the schedule in the deed. By one of them the schedule is incorporated in the deed for the purpose only of ascertaining the persons who have executed the deed. The second reference to the schedule is immediately after the witnessing part, by which it is witnessed that "in pursuance of the agreement, and in consideration of the composition of three pence in the pound on the amount of their respective debts, as mentioned in the schedule, paid by *Laxton* to the several persons parties to the deed of the second part," that is, the creditors who have executed the deed.

The third and only remaining reference to the schedule is in the release, by which the parties who had executed the

the deed released *Laxton* from payment of the sums of money set opposite to their respective names or the names of their respective firms in the schedule.

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 Ex parte  
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The only reference made by the deed to the schedule, therefore, is, for the purpose of ascertaining who are the individuals who have executed the deed, and accordingly the schedule specifies the creditors who have executed, their signatures being given under a separate column headed "signatures of the creditors," and there is another column for "witnesses," and the third remaining column for the seals of the parties.

The consequence, therefore, is, that the creditors who have not executed the deed are by no means named and described in the deed itself. They appear in the schedule; but the schedule is incorporated in the deed only so far as it contains the names of the parties who have executed the deed. There is not, therefore, in fact even a statement in the body of the deed of the persons or of the debts due to the persons who have not executed.

That being the state of the case, there is upon the face of the deed, by reason of the form of its construction, a most material difference in the situation and in the legal right between the creditors who have executed and those who have not executed. The deed proceeds upon a recital that the several persons whose names and seals are thereunto subscribed and set (that is, the parties who have executed) have agreed to accept the composition and to release *Laxton* from their debts; and then it witnesses, that in consideration of the composition being paid by *Laxton* to those persons, those persons (viz. the creditors who have executed the deed) release *Laxton* from their debts.

As

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As I explained on a former occasion, in my view of the statute, a deed to bind creditors who have not executed it must be a deed which places the parties who execute, and the parties who do not execute, upon an equal footing in point of law. That is not the case upon this deed; for upon this deed, according to the authorities cited upon the former occasion, and which settle the principle of law, no one of the creditors who has not executed the deed could sue *Laxton* upon the covenant contained in that deed (a). I mean by the covenant, that in the latter part of the deed, by which *Laxton* covenants with the several persons, parties thereto of the second and third parts (there being in reality, for the reason I have already given, no persons who are parties of the third part), that he will, upon demand, pay to all and singular creditors the composition of three pence in the pound.

There is, therefore, this vice in the deed, that it is so framed as not to give the creditors who have not executed the deed even the benefit of that covenant: but for the reasons that I previously gave I adhere to the opinion, that if the deed had been framed with greater skill, and had given to the creditors who had not executed it a clear right of suing upon the covenant, yet a remedy upon the covenant, being contrasted with immediate payment, would place those creditors in a situation of disadvantage and inequality as compared with the other creditors, and consequently that it would be impossible, upon the principle of constructive execution, to make the deed binding on the creditors who have not actually executed it. The statute provides that it shall be binding upon creditors who have not executed as if they were parties to and had duly executed the same. If they were parties to the

same

(a) See ante, p. 132, note.

same and had executed it, it would still place them in a station of inferiority as compared to those parties to whom the money had been paid previously to the registration of the deed.

I see no reason, therefore, for departing from the opinion which I have already expressed. The invalidity of the deed for the purpose of binding non-assenting creditors arises not from the facts of the case, which clearly would have admitted of the deed being so framed as to bring the case within the operation of these sections; the fault lies entirely in the want of sufficient care and skill in the preparation of the deed. I must adhere in both cases to my former judgment.

1864.  
Ex parte  
COCKBURN.  
In re  
SMITH  
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LAXTON.

Ex parte GEORGE MILWARD MIDDLETON.

In the Matter of GEORGE MILWARD MIDDLETON, a Bankrupt.

March 12.  
June 4.  
Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

THIS was an appeal from an order of Mr. Commissioner *Fane* confirming an adjudication of bankruptcy against the Appellant *George Milward Middleton*.

On Goods were  
contracted to  
be sold, with a

condition that they should not be delivered unless the vendors chose or the goods were required by the purchaser for the actual purposes of his business until payment of a bill of exchange which was given by the purchaser for the full value of the goods. The bill of exchange having been dishonoured and the goods nearly all remaining undelivered, the purchaser executed a trust deed under sect. 192 of the Bankruptcy Act, 1861, and the vendors assented thereto for a sum which included the value of goods contracted to be sold:—*Held*, that upon the facts of the case the contract for sale and purchase was absolute and not conditional, and that the retention of the goods was to operate as a security for the payment of the bill of exchange, and that the vendors could if they chose assent to the deed for an amount of which the sum so secured formed part.

*Semble*, however, that by so assenting they forfeited their security.

The debt of a non-assenting creditor entered by the debtor in the schedule of debts required by the General Orders in Bankruptcy of 22 May, 1862, but therein marked "disputed," cannot, in the absence of the creditor, be disregarded in calculating the statutory majority of assenting creditors.



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Ex parte  
MIDDLETON.  
In re  
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On the 9th of *November*, 1863, the Appellant executed a trust deed for the benefit of his creditors under the Bankruptcy Act, 1861, section 192, and it was duly registered.

The schedule of debts, made out to accompany the deed, showed the total amount of debts to be 11,615*l.* 17*s.* 6*d.*, and the amount of the debts of assenting creditors to be 8,724*l.* 14*s.* 4*d.*

A debt of 284*l.* part of a debt of 2,087*l.* 3*s.* 0*d.*, entered as due to Messrs. *Hodgson & Bibbins*, wine merchants, who were assenting creditors, had been contracted under the following circumstances.

The Appellant purchased from Messrs. *Hodgson & Bibbins* a quantity of wine, the price of which was 284*l.*, subject to a stipulation that Messrs. *Hodgson & Bibbins* should not be under any obligation to deliver the wine before the payment of a bill of exchange for 284*l.* held by them, unless the Appellant absolutely required any part of the wine for the purposes of his business; in that case he was to be at liberty to insist on its delivery. Only a small part of the wine was delivered, and the bill of exchange was dishonoured.

On the 24th of *December*, 1863, the Appellant was adjudicated a bankrupt.

On showing cause against the confirmation of the adjudication it was contended before the Commissioner on behalf of the Appellant, that the previous registration of the trust deed avoided the adjudication. To this several objections were taken on behalf of the petitioning creditors. It was objected first, that in the schedule of debts filed in pursuance of the General Order in Bankruptcy  
of

of 22nd May, 1862, together with the deed upon its registration, the creditors had not been arranged in alphabetical order. The Commissioner however thought that the provisions of the order were directory only, and overruled the objection.

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 Ex parte  
 MIDDLETON.  
 In re  
 MIDDLETON.

It was then objected that in the same schedule a blank had been left for the amount of the debt due to one of the unsecured creditors. The objection however was not pressed, it appearing that even with the addition of the amount of the debt no variation would be caused with reference to the assent of the requisite statutory majority of creditors.

A third objection was raised in the Court below, and was renewed on the present appeal on the ground that Messrs. *Hodgson & Bibbins* were secured creditors for the 284*l.* above-mentioned, that the amount of their debt ought consequently to be diminished by that amount, and that if that were done the total amount of debts would be reduced to 11,331*l.* 17*s.* 6*d.*, three-fourths of which was 8,498*l.* 18*s.* 1½*d.*, thus reducing the amount of the debts of assenting creditors to 8,440*l.* 14*s.* 4*d.*, and invalidating the deed.

The Commissioner was of opinion that the debt of 284*l.* was a secured debt, and affirmed the adjudication.

The present appeal was from that decision.

On the opening of the appeal, Mr. *Sargood* for the Respondents, the petitioning creditors, asked leave to put in evidence an affidavit showing that there existed a creditor of the debtor whose name was wholly omitted from the schedule of debts filed in pursuance of the General Order.

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Order. He submitted that as the order required a faithful statement of debts, of which the proposed evidence disproved the existence in the present case, and as the admission of this new debt would turn the scale against the majority, evidence showing that the debtor had filed a false statement of debts should, in view of the public interests and for the prevention of frauds on the part of debtors, be received at any time, and that at any rate the debtor could not raise any objection to its reception.

[The LORD CHANCELLOR declined to receive the affidavit, and said that the evidence should have been adduced in the first instance. The utmost that could be done would be, at the suggestion of the opposing creditors, to refer the matter back to the Commissioner in the manner in which his Lordship afterwards on hearing the case on its merits did refer it.]

The appeal then proceeded on the merits.

Mr. Bacon and Mr. Reed for the Appellant, relying upon *Ex parte Solomon, Re Aubusson*(a); *Bankrupt Law Consolidation Act*, 1849, s. 104(b); *Bankruptcy Act*, 1861, ss. 192, 198, 199(c); and the General Orders in Bankruptcy of 22nd May, 1862, argued that the contract between the Appellant and Messrs. *Hodgson & Bibbins* was an absolute contract for sale, and that therefore a debt existed here, and that such debt was properly reckoned at its full amount, the wine in question having been retained by those gentlemen as a security not for the purchase-money but for the bill of exchange. Even assuming however, as they did not admit, that the present

was

(a) 1 G. & J. 25.

(c) 24 & 25 Vict. c. 134.

(b) 12 & 13 Vict. c. 106.

was a case of a security, a creditor who assented to a trust deed under the Bankruptcy Act, 1861, was in the same position as a creditor in bankruptcy who had proved, and therefore in the present case Messrs. *Hodgson & Bibbins* by executing the deed for the full amount of their debt had waived all right to their security, and that, therefore, even on this assumption the debt was properly reckoned at its full amount, and the statutory majority of assenting creditors obtained.

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 Ex parte  
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 MIDDLETON;

Mr. *Sargood*, for the Respondents, contended that as the wine was not delivered and the bill of exchange was dishonoured, no sale had in fact taken place, and the right of Messrs. *Hodgson & Bibbins* to retain the wine as yet undelivered was clear, *Bishop v. Shillito* (a). Therefore there was no debt to the extent of this 284*l*. But that if there was a debt Messrs. *Hodgson & Bibbins* were in the position of creditors holding security for it, and their debt ought not to be reckoned unless they consented to give up that security.

The LORD CHANCELLOR who during the argument observed, with reference to the words "other process" in the 198th section of the Bankruptcy Act, 1861, that they meant other process ejusdem generis with the other matters there mentioned, and did not apply to proceedings in bankruptcy, said at its close, without calling for a reply,—

The facts of this case do not enable me to say that there was not a debt amounting to 2,087*l*. due from the Appellant to Messrs. *Hodgson & Bibbins* at the date of the execution of this deed.

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(a) 2 B. & Ald. 329, note (a).

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Ex parte  
MIDDLETON.  
In re  
MIDDLETON.

The question turns upon an alleged contract for the purchase of wines amounting to 284*l*. Had the facts warranted the deduction that this contract was only conditional, a contract only to arise and become binding upon a certain bill of exchange being paid, there would have been nothing to transfer the property in the wine to the Appellant or make him liable for the price. But the examination of the debtor himself, however, which is before me, clearly shows that the contract was an absolute contract for purchase and not a conditional one.

That contract was, however, accompanied with a stipulation that Messrs. *Hodgson & Bibbins* should be under no obligation to deliver the wine until a certain bill had been paid, unless they chose so to do; but with this further exception accorded to the Appellant, that if he absolutely required for the purposes of his business the delivery of a part of the wine, he should have the right of requiring that delivery. Accordingly we find, as a fact, that some of that wine was delivered.

I must assume, therefore, that there was a contract passing the property in the wine, and at the same time creating a debt subject only to an engagement that if the creditor elected to claim such a right he might retain the wine as a species of security to continue until a particular bill might be paid. That in effect amounts to this, that the retention of the wine was to operate in the nature of a security to the creditor for the payment of that bill.

It differs very materially from the case of *Bishop v. Shillito*, for that was a contract to exchange iron for bills of exchange; that is to say the purchase-money of the iron was to be paid, and the contract of purchase  
was

was to be completed by the delivery of certain bills of exchange as the purchase-money, and the seller of the iron having on the faith of that contract delivered part of the iron without receiving the bills, which in reality were never handed over to him, the consideration for that contract failed altogether, and the person who had delivered the iron was held entitled to recover it.

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But here the contract is complete with respect to the engagement made to deliver, subject to a collateral undertaking with respect to retaining possession of the wine until the bill was paid, unless the seller thought proper to deliver or unless the buyer should show that he actually required the goods bought for the exigencies of his trade.

In my judgment, therefore, the sum of 284*l.* did form part of the debt due to Messrs. *Hodgson & Bibbins* at the date of the deed, and they were at liberty to treat themselves as creditors of the debtor to that amount if they thought fit so to do, and to prove in effect, that 'is to execute the deed in respect of that amount. They released by virtue of that proof the right of insisting upon the retention of the wine.

I think, therefore, that the 284*l.* must be considered as a valid part of the 2,087*l.* due to Messrs. *Hodgson & Bibbins*, and that the exigencies of the statute with respect to the required majority in value of the debts has been satisfied by the signature of Messrs. *Hodgson & Bibbins* in respect of the 2,087*l.*

That signature is complete for all purposes. I think that it would not be competent to Messrs. *Hodgson & Bibbins* to alter that signature or to withdraw that amount; and as between them and the debtor they were;

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in my judgment, in reality creditors of the debtor for that amount. The case therefore is brought back to the materials that are contained in Mr. *Sargood's* additional affidavit, and on that I think the most convenient course and the one best for all parties will be to make a reference back to the Commissioner to make the inquiry which has been already suggested in the very terms of the first paragraph of the 192nd section of the statute, whether at the time of the registration of the deed a majority in number representing three-fourths in value of the creditors of the debtor whose debts respectively amounted to 10*l.* and upwards had before or after the execution thereof by the debtor, in writing assented to it or approved thereof.

Let the case stand over pending that inquiry.

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June 4.

On this day the matter again came before the LORD CHANCELLOR on the appeal of the bankrupt from the report of the Commissioner which negatived the alleged fact of the requisite statutory majority of creditors having in writing assented to or approved of the deed.

The schedule of debts had received the addition of two debts due to creditors, who were unnoticed in the former schedule, and this addition, together with that of the debt due to the unsecured creditor opposite to whose name in the former schedule a blank had been left, had the effect above mentioned of avoiding the statutory majority of assenting creditors and turning the scale against the debtor. To restore the balance it was sought on the present appeal to expunge from the list of debts a debt of 700*l.*, which was entered by the debtor as  
due

due to a Mr. *Walter Scott* of *Hull*, a non-assenting creditor, but with the addition to the entry of the word "disputed;" inasmuch as if such debt could be expunged, the requisite majority was obtained.

1864.  
Ex parte  
MIDDLETON.  
In re  
MIDDLETON.

It appeared that an action in respect of this debt, brought by Mr. *Scott* against the Appellant, was still pending.

Mr. *Bacon* and Mr. *Reed*, for the Appellant, adduced evidence to show that the claim was groundless; and contended that the statute required only real debts to be set forth, and not matters in dispute; and that the entry of the claim in the schedule was proof of the scrupulous honesty of the debtor in the matter.

Mr. *Sargood*, for the Respondents, was not called upon.

*The* LORD CHANCELLOR.

I am sorry that I cannot entertain the application so as to sustain this deed.

The question arises as between the debtor and the act of parliament. The debtor sets up the act of parliament against opposing creditors, who wish to make him a bankrupt, and he undertakes to prove that the requirements of the act have been complied with.

If such compliance be established, the opposing creditors are bound by the deed.—[His Lordship then referred to the various proceedings which had taken place with reference to the deed, and proceeded thus:—Under the inquiry before the Commissioner upon the reference back to him, it might have been competent to



1864.  
Ex parte  
MIDDLETON.  
In re  
MIDDLETON.

the Appellant to proceed to strike out the debt of 700*L.* claimed as being due to Mr. *Walter Scott* of *Hull*; but to do that effectually, Mr. *Scott* should have been brought before the Court. It was however attempted to be done without summoning Mr. *Scott*. I cannot listen to the excuse that Mr. *Scott* could not be found; more especially as an action has been brought by that gentlemen against the Appellant, which is still pending.

The deed therefore comes back to me with Mr. *Scott's* name remaining on it unerased, but with the addition of certain other debts, which turn the scale against the debtor, by showing that the act of parliament has not been complied with.

I am then pressed by the Appellant, in the absence of Mr. *Scott*, to try the question myself, and to strike out his debt in order to restore the balance.

I cannot do so. On a question between the Appellant and the act of parliament, the Appellant's own representations must bind him. The debt having been entered by him as a debt, he cannot now get rid of it by inserting the qualification which he has added, otherwise it would be an easy way for debtors to bring themselves within the act and to obtain a majority in number and value of their creditors, if they could get rid of the non-assenting creditors by putting the word "disputed" opposite their debts. I cannot listen to the argument. Here I have not only 700*L.*, the amount of the debt put down, but I actually find that 700*L.* entered in the total of debts as cast up by the debtor himself and sworn to in his affidavit. If the question be tried, as it must be, upon the face of the documents handed in by the debtor himself, the debtor's statement must be taken *primâ facie* against him, and the debt as stated taken into account  
in

in ascertaining whether or not there has been a compliance with the act of parliament. The addition made to the list by the report must be taken into account for the purpose of ascertaining whether the act of parliament has been complied with. It had not been taken into account; and when taken into account, turns the scale against the debtor. I cannot qualify the statement of the debtor by giving effect to his allegation that Mr. *Scott's* debt is disputed; the debt must be taken as the debtor has stated it.

1864.  
Ex parte  
MIDDLETON.  
In re  
MIDDLETON.

In that state I find the case; in that state I adjudicate upon it. I find that the deed does not comply with the act of parliament.

His Lordship then dismissed the appeal with costs of the present hearing, and ordered the remaining costs of the appeal to be paid out of the estate.

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1864.



## Ex parte EDGAR BROOKS.

In the Matter of EDGAR BROOKS.

May 25.

June 8.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

Where a debtor has executed a deed under the Bankruptcy Act, 1861, s. 192, any creditor, although denying the validity of the deed, is entitled to examine the bankrupt. But such creditor must submit to the jurisdiction in bankruptcy.

THIS was an appeal from an order of the Commissioner of the *Birmingham* District Court of Bankruptcy, by which he directed that the Appellant, who had executed and registered under the 192nd section of the Bankruptcy Act, 1861, a deed of composition with his creditors, should be committed for contempt for refusing to submit to examination at the summons of the Respondent *Joseph Wilson*, a creditor who did not assent to the deed of composition.

The Appellant had stated in his affidavit, filed upon the registration of the deed, that amongst the creditors assenting to the deed was the *Birmingham Banking Company*; that their entire debt was 8,602*l.* 15*s.* 11*d.*, and that they held security valued at 4,200*l.*

The Respondent took out a summons against the Appellant in the District Court of Bankruptcy for him to attend the Court and be examined touching his estate, with a view, as the Respondent admitted, to disprove, by the examination of the debtor, the truth of the allegation as to the value of the security, and thus by showing the invalidity of the deed by reason of its non-compliance with the statutory conditions as to the requisite majority of assenting creditors to support certain proceedings at law then pending at his suit against the Appellant.

Upon the return of the summons it was objected on  
the

the part of the Appellant that the Respondent, not having assented to the deed, had no right to examine the Appellant.

1864.

Ex parte  
Brooks.  
In re  
Brooks.

The Commissioner overruled the objection, and upon the debtor persisting in his refusal to be sworn unless the creditor would execute the deed, made the order under appeal; suspending its execution, however, with a view to an appeal.

Mr. Sargood, for the Appellant, referred to *Anonymous* (a); *Ex parte Abbott* (b); *Ex parte Lawrence* (c); *Ex parte Collins* (d), before the Court of Bankruptcy, and admitted that if the immediate object of the proposed examination by the creditor had not been to show that the deed was invalid, but had been a purpose beneficial to the creditors claiming under the deed, it ought not to be checked, although the indirect consequence of the examination might be the destruction of the deed. But he contended that if, as avowedly here, the proposed examination was not for the purpose of benefiting the creditors under the deed, but was merely for the purpose of destroying the deed, it could not be permitted, since it would be at variance with the rule in bankruptcy to permit such an examination. The creditor here was in fact bound by the deed, and could not be in a better position than that of a creditor who had proved under a fiat; and a creditor who had proved under a fiat was not permitted to pursue an examination of the bankrupt having for its immediate object not a result beneficial to the rest of the creditors, but the destruction of the fiat itself.

He

(a) 6 L. T. (N. S.) 166.

(c) *Ib.* 559.

(b) *Ib.* 195.

(d) *Ib.* 665.

1864.

Ex parte  
Brooks.  
In re  
Brooks.

He further referred to *Ex parte Middleton* (a), and contended that neither the 136th nor the 197th sections of the Bankruptcy Act, 1861, had any application to the present Respondent's case.

Mr. *W. D. Griffith*, for the Respondent, referring to *The Bankruptcy Act*, 1861, s. 197; *Ex parte Bonsor* (b) and *Malkin v. Adams* (c), argued that a creditor who had proved under a bankruptcy might yet take proceedings for the purpose of superseding it; and that in the case of a deed like the present, if a similar procedure were not permitted, a majority might easily be made up by means of fictitious creditors.

Judgment reserved.

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*The LORD CHANCELLOR.*

June 8.

This is an appeal from an order of a learned Commissioner, by which he directed the debtor, who had executed a composition deed, to be committed in consequence of his refusal to answer certain questions put to him by a creditor who had not either executed the deed or assented to it in writing.

The proposition on the part of the debtor was this, that the creditor was bound by the deed, and that, therefore, as the obvious purport of the examination was merely to destroy the deed, the Court ought not, according to the old rule of bankruptcy, to sanction an application to itself, the purpose of which was to destroy its own process and put an end to its own jurisdiction. And cases were cited on behalf of the debtor, and in particular

(a) *Supra*, p. 139.

(b) 2 *Rose*, 61.

(c) 2 *Rose*, 33 (n).

particular the case of *Ex parte Lawrence* (a), in which several learned Commissioners had applied the old rule in bankruptcy to cases arising under deeds.

1864.

*Ex parte*  
BROOKS.  
In re  
BROOKS.

I cannot but notice in the first place the mistake involved in these decisions of supposing that a creditor becomes better entitled to the interposition of the Court of Bankruptcy by having signed the deed.

If the deed be one which complies with the statute, a creditor who has not signed is equally bound as a creditor who has signed; and a creditor by signing the deed does not disentitle himself to the right of putting questions for the purpose of trying the validity of the deed any more than a creditor is disentitled who has not signed or in writing assented to the deed at all. Either the creditor is bound or he is not bound, according as the deed, assuming it to be duly registered, does or does not comply with the statute. If therefore a creditor presents himself and addresses questions to the debtor for the purpose of trying the validity of the deed, he certainly does not become better entitled to such an examination by reason of his having executed the deed or in writing assented to it. He is neither better nor worse.

But I think I shall better expound the statute if I hold that the old rule in bankruptcy of refusing to hear any person who had not proved does not furnish any rule of analogy on the foundation of which a creditor ought to be excluded who had not executed or assented in writing to the deed.

Such a creditor is *primâ facie* bound by the registration of the deed, and being so *primâ facie* bound, he stands

(a) 6 L. T. (N. S.) 559.

1864.

  
Ex parte  
Brooks.In re  
Brooks.

stands in just the same position for having the aid of the Court as a creditor who has proved in bankruptcy.

I regret that the statute did not in the first instance give to the Court of Bankruptcy exclusive jurisdiction over all persons claiming under or bound by these deeds. Creditors whether they claim under a deed or are bound by a majority are made to stand in the place of creditors who have proved in bankruptcy, and it must always be remembered that in the case of a trust deed where any examination is directed to try the validity of a deed, the result of the examination may, in the event of the invalidity of the deed being established, be to prove the necessity of the action and adjudication of that Court upon the deed, as the ground of the commission by the execution thereof of an act of bankruptcy on the part of the debtor. Such a case is not one to which the old rule in bankruptcy is applicable; for if the creditor under the old rule succeeded in showing that no case of bankruptcy existed, the whole thing failed: but in a great number of instances where a creditor shows that a deed does not comply with the statute, he shows at the same time (and that is frequently his object) that a case of bankruptcy does exist and no case of a deed.

I think that all parties, whether they have executed the deed, whether they have assented to it in writing, or whether not having executed and not having assented to it they are bound by it, should have the greatest facilities of resorting to the Court of Bankruptcy for the purpose of ascertaining whether the deed does or does not comply with the statute. But then the creditor who denies that he is bound by the deed, and yet applies to the Court of Bankruptcy for leave to examine, must submit entirely to the jurisdiction of that Court; and therefore, if at the same time that he makes his application he insists, for example,

example, upon holding the debtor in prison, or is retaining property for his own exclusive use, which is demanded or sought to be recovered under the deed, or is defending an action in which the trustee of the deed, or the debtor named therein, is Plaintiff, the Court of Bankruptcy ought not, where there is a substantive proceeding to withdraw or to withhold property that is claimed under the deed from its operation, to aid the creditor so circumstanced in claiming additional facilities for examination.

On the other hand, if the creditor comes into the Court of Bankruptcy not being in that predicament, but bonâ fide asserting that the case ought to be one of bankruptcy and not of a deed, and that the deed is not valid or in conformity with the requirements of the statute, every facility ought, in my judgment, to be afforded that creditor for examination.

It is not requisite that I should do more than express my opinion that the order under appeal was right, and that the debtor under the circumstances of the case is bound to answer the questions put to him under the order for the summons. With that intimation of my opinion, I remit the case to the learned Commissioner.

1864.

Ex parte  
BROOKS.

In re  
BROOKS.



1864.



## Ex parte SAMUEL BARTHOLOMEW SMITH.

In the Matter of a Deed of Conveyance made between  
SAMUEL BARTHOLOMEW SMITH and his  
Creditors.

May 25.  
June 8, 25.  
July 30.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

Where an application had been made in Chambers to a judge of a Court of Law for the release from custody under a ca. sa. of a debtor who had previously to his arrest registered a deed purporting to be a deed under the Bankruptcy Act, 1861, s. 192, and obtained thereon the Chief Registrar's certificate under s. 198, and the judge had decided that the deed was not within the provisions of the 192nd section of the Bankruptcy Act, 1861:—*Held*, that the Court of Bankruptcy had properly refused to release the debtor.\*

The proper course in such a case is to apply to the Court out of which the judgment issued.

Whether the Court of Bankruptcy would have had jurisdiction if the deed had been valid within the 192nd section of the Bankruptcy Act, 1861, *quære*.

In calculating the statutory majority of assentient creditors required under the Bankruptcy Act, 1861, s. 192, to render a deed under that section binding on non-assentient creditors, secured creditors must be taken in account in the computation of the number of creditors constituting the majority.

But *semble* that the amounts of their securities should be deducted in calculating the majority on the question of value (*u*).

THIS was an appeal by *Samuel Bartholomew Smith* from the refusal of Mr. Commissioner *Goulburn* to order his discharge from custody under process issued out of the Court of Exchequer.

*John Venables May*, the indorsee of a bill of exchange for 75*l.* 3*s.* 7*d.*, drawn by the Appellant and dishonored, brought, in the month of *July*, 1863, an action on the bill against the Appellant in the Court of Exchequer, and recovered judgment therein on the 17th of *December*, 1863.

Previously thereto, however, viz.:—on the 12th of *December*, 1863, the Appellant executed a trust deed, which, with an unimportant variation, was in the form given in schedule (D) to the Bankruptcy Act, 1861, and which he procured to be registered under the 192nd section of that

(a) See however as to this the cases cited below, p. 166, note.

that act, obtaining the Chief Registrar's certificate of the fact.

1864.

Ex parte  
SMITH.

In re  
SMITH'S  
TRUST DEED.

On the 23rd of *April*, 1864, the Appellant was arrested at the suit of *May*, under a writ of ca. sa. issued in the action of *May v. Smith*, the arresting officer being indemnified by *May* as to the consequences of the arrest, and disregarding the Chief Registrar's certificate, which was produced to him by the Appellant.

On the 29th of *April* a summons for the discharge of the Appellant from custody was taken out on his behalf in the action of *May v. Smith*. It came on for hearing on the 30th of *April*, 1864, before Mr. Baron *Martin*, at chambers; when that learned judge, being of opinion that the Appellant's secured creditors ought to have been taken into account in calculating the total number of the Appellant's creditors assenting to the trust deed, whereas it appeared that such creditors had not been so taken into account, held, that the deed did not comply with the requirements of the statute, and made no order on the summons.

An application was thereupon made to Mr. Commissioner *Goulburn* in bankruptcy for the debtor's discharge from custody.

This application however was also refused, the Commissioner thinking that, as the matter had been heard and decided on the merits by a superior Court of Law, he had no jurisdiction to interfere.

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From this refusal the present appeal was brought.

*May* 25.

Mr.

1864.

*Ex parte*  
SMITH.  
In re  
SMITH'S  
TRUST DEED.

Mr. Sargood for the Appellant.

The learned Commissioner's ground of refusal was that he had no jurisdiction. The ground of the present appeal is, that the Court of Bankruptcy has power to vindicate its own authority. The effect of the certificate of registration as a protection is nugatory, if the Court of Bankruptcy cannot discharge a debtor from custody. The cases of *Ex parte Castleton* (a); *Welch v. Buck* (b) are in point, but were not brought to Mr. Baron Martin's attention, the only case cited to him being that of *Ex parte Godden* (c), with reference to the necessity of reckoning the secured creditors in calculating the statutory majority of assenting creditors.—[The LORD CHANCELLOR: As to that point, does it not follow, from section 192 of the act, that creditors who have proved must deduct the value of their securities?—The question simply is, has not the Court of Bankruptcy jurisdiction to enforce its own process. I submit that it has.

Mr. Reed (Mr. Talfourd Salter with him) for the Respondent.

As to the mode of calculating the statutory majority of assenting creditors, the debtor ought not to be permitted to make the valuation of the securities held by his creditors. *Ex parte Godden* (c), before the Lords Justices, overruled the contrary decision of the Commissioner in the same case. *Ex parte Morgan* (d) is consistent with it, and so is *Ex parte Spyer* (e).—[The LORD CHANCELLOR: I never said that a debtor might, in calculating the statutory majority, put his own value  
on

(a) 31 L. J. (N. S.) Bank. 71.


(d) *Ib.* 64.

(b) 31 L. J. (N. S.) Q. R. 263.

(e) *Ib.* 94.

(c) *Supra*, 36.

on property comprised in the securities of secured creditors. I meant to say that where creditors, having a security, executed a deed for a specified amount, they must do so on the same footing as that on which they would be admitted to prove in bankruptcy. The point in *Ex parte Morgan* was, whether, when a creditor assents describing his debt and not deducting his security, he would not be as though he had proved in bankruptcy without deducting his securities. If he rates his security too low so much the worse for him. If he rates his security too high so much the better for the other creditors. I never intended in *Ex parte Morgan* to express anything at variance with *Ex parte Godden*. Secured and unsecured creditors must be included.]—At all events, secured creditors must be reckoned in number in the calculation of the statutory majority.

1864.  
  
*Ex parte*  
 SMITH.  
 In re  
 SMITH'S  
 TRUST DEED.

On the question of jurisdiction I submit that the Court of Bankruptcy has none in the present case. The Court of Law whence the process issued was the proper tribunal to apply to; *Re Harewood (a)*.

He also referred to the *Bankrupt Law Consolidation Act*, 1849, ss. 112, 113.

Mr. *Sargood*, in reply, as to the question of jurisdiction cited *List's Case (b)* and *Plomer v. Macdonough (c)*, and argued that *Ex parte Castleton (d)* recognized the jurisdiction of the Court of Bankruptcy.

Reference was also made to the *Bankruptcy Act*, 1861, s. 198; The General Order in Bankruptcy of May 22nd, 1862; *King v. Randall (a)*.

*The*

(a) 7 L. T. (N. S.) 171.

(b) 2 V. & B. 373.

(c) 1 De G. & S. 232.

(d) 31 L. J. (N.S.) Bank. 71.

1864.

Ex parte  
SMITH.In re  
SMITH'S  
TRUST DEED.*The LORD CHANCELLOR.*

I am not satisfied as to my jurisdiction in this matter. Although I should be glad to give an opinion on the other point, any opinion which I might express would be an obiter opinion only and not an authority, and therefore I abstain from expressing such opinion, unless the parties are agreed to abide by my decision. I can quite understand why Mr. Baron *Martin* entertained the question; the word "such" in the opening of the 198th section of the act introducing by reference all the antecedent conditions contained in the 192nd section.

Mr. *Reed* consented to submit to the jurisdiction of the Court.

*The LORD CHANCELLOR* remarked that the extent to which he had intended to go in the various cases was this, that a secured creditor bound by or assenting to a deed was to be treated as a creditor in bankruptcy holding security; but that his Lordship had given no opinion whether, in the computation of the number of creditors by the debtor, the debtor might omit a secured creditor on the debtor's own estimate of the value of the security.

Mr. *Sargood* was then heard as to the question of the mode in which the secured and unsecured creditors were to be reckoned in computing the statutory majority. His argument was to the following effect:—

The legislature contemplated that the computation should be the act of the debtor. The order of 22nd of *May*, 1862, only supplies an omission in the act itself. The object of the tabular statement given in that order must

must be something, and may be said to be for proof. But proof cannot be the object of the order, because creditors cannot be bound by their debtor's estimate of their debts. But the debtor is the person to render the account, and if he renders an erroneous account, he files it at his own peril. No doubt creditors are largely interested who assent to a deed of this nature; and the principle in the view of the legislature was to give to those who have an interest a power of controlling the subject of the interest. But creditors fully secured have no interest. The remarks of Lord Justice *Turner* in *Ex parte Godden* have been misunderstood. His Lordship says, "There is, as it seems to me, another objection which is fatal to this deed. I think it has not the assent of the necessary proportion in value of the creditors; for, according to the best opinion which I can form upon the point, I think that, in reckoning the proportion of assenting creditors under this section, the debts due to secured as well as unsecured creditors must be taken into account;" but then his Lordship gives as his reason for this his opinion, "otherwise creditors imperfectly secured would be left at the mercy of the unsecured creditors." That must mean that creditors to the extent to which they are unsecured, being affected by the acts of any majority, are entitled to be heard, and ought not to be struck out of the computation. Creditors, therefore, partially secured must be reckoned; but it does not, therefore, follow that creditors wholly secured must be; and I submit that they should not be, and that a fully secured creditor is not a creditor within the meaning of the act. The question of the distinction between partially and fully secured creditors has never yet been discussed in any of the decided cases.

1864.

*Ex parte*  
*SMITH.*

In re  
*SMITH'S*  
TRUST DEED.

Judgment reserved, with an order by consent  
to discharge the debtor on his finding two

Vol. I—2.

M

D.J.S. sureties

1864.  
 Ex parte  
 SMITH.  
 In re  
 SMITH'S  
 TRUST DEED.

June 8.

*The* LORD CHANCELLOR.

sureties to the amount of the detainer,  
 that he would surrender himself to the  
 process of the Court if recommitted.

An application was made to me in this case to discharge a debtor, Mr. *Samuel Bartholomew Smith*, out of custody. The application was grounded on the debtor's having obtained protection from the Court of Bankruptcy, in consequence of his having executed a trust deed for the benefit of his creditors, and supported by the argument that the Court of Bankruptcy has jurisdiction to discharge a person who has been arrested under a final process issuing from a Court of Law, where that person has obtained the protection of the Court of Bankruptcy.

It is unnecessary in this case to enter into a consideration of that question. For I find that after Mr. *Smith* was imprisoned under a writ of *capias* issued by the Court of Exchequer, an application was made on his behalf to one of the learned Barons of that Court for his discharge. The application was opposed on the ground that the trust deed executed by him was not such a deed as the statute requires for the purpose of binding non-assenting creditors, and it certainly is clear from the section which empowers the Registrar to grant protection, that the protection can only be granted in the event of the deed being such a deed as the act describes; the protection consequently depending upon the statutory character of the deed. Whether the deed in the present case was or was not such a deed, was tried and decided adversely to the deed by Mr. Baron *Martin* in Chambers, who accordingly held that the 198th section of the act, which enables protection to be granted, was not available  
 to

to the present debtor. Of course the protection spoken of in that section depends entirely for its validity on the fact of the deed being in the words of the section "such" a deed; wherein the word "such," being as it is a relative word, carries us back to the anterior requisites and calls upon us to apply those requisites as the foundation of the protection which flows from the execution of the deed.

1864.  
 Ex parte  
 SMITH.  
 In re  
 SMITH'S  
 TRUST DEED.

Mr. Baron *Martin*, then, having decided that the deed now before the Court had not the proper requisites for registration, I cannot, in this indirect manner, reverse his decision, or constitute myself a Court of Appeal from any common law judge or any common law tribunal. When a question of this kind is raised founded upon the construction of the statute, the proper course is to apply to the Court by which the judgment was delivered.

In the present case, owing to the consent which has been given to release the debtor out of custody upon terms, there may be a difficulty possibly in making an application to the Court of Exchequer. If, therefore, the parties are content to take the matter by arrangement before me upon the question of the validity of the deed, I will hear them and give my judgment upon the point. Otherwise the debtor must again be committed to prison.

Mr. *Sargood* and Mr. *Reed* having on behalf of their respective clients assented to the case being argued before the Lord Chancellor upon the footing mentioned in his Lordship's judgment, the case stood over for further argument, the Lord Chancellor remarking that the question was as to the meaning of the value of a debt. *Primâ facie*, that meant the amount of the debt less the value of any property held as a security for it. That the expression "estate" must mean the distributable



1864.

Ex parte  
SMITH.

In re  
SMITH'S  
TRUST DEED.

estate, that was the estate minus the specific securities affecting it. If a creditor under a trust deed was to stand *in eodem statu* with a creditor in bankruptcy, debts under a deed must be valued on the same conditions as debts in bankruptcy, that was with deduction of securities held for them. Therefore, in estimating the statutory majority, the unsecured portion of the debt was to be alone taken into account. Then who was to value this amount. The debtor did that, and did it at his peril. Unless he did it fairly he did not come within the statute. Therefore the conditions in the 192nd section were inserted. The debtor must therefore put on the security a true value. The object of the statute was to preserve a complete analogy between a bankruptcy and a trust deed.

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June 25.

The case now came on to be argued on the question of the validity of the deed.

Mr. Sargood for the Appellant.

A creditor's debt is to be reckoned after deducting the value of his security, for the value of a debt is the amount of the debt minus the property held by the creditor as security for it. Security is substantially a part payment of the debt. A creditor in bankruptcy proves for his debt minus the security, and a creditor under a trust deed is *in eodem statu*, and his debt must be valued upon the same condition as a debt in bankruptcy.

Therefore a fully secured creditor is not a creditor at all within the meaning of the act, and, consequently, ought not to be taken account of in estimating the number of creditors.

Mr.

Mr. *Reed* for the Respondent.

It is clear from decided cases that a creditor holding security must have his debt counted, for the purpose of the statutory majority, without deduction. But even if the Court overrules those cases, a creditor holding a security must have his name counted.

1864.  
Ex parte  
SMITH.  
In re  
SMITH'S  
TRUST DEED.

[*The LORD CHANCELLOR.* The 197th section gives a clear intimation of the intention of the legislature that everything should be as in bankruptcy.]

*Ex parte Godden* (a); *Turquand v. Moss* (b); and *The Bankrupt Law Consolidation Act, 1849, s. 224* were cited.

Mr. *Sargood* in reply.

The common law decisions supposed to follow *Ex parte Godden* have gone on a misconception of that case. The distinction between partially and fully secured creditors has never yet been considered; nor have the words in the Bankruptcy Act, 1861, s. 192, condition 1, "majority in number *representing* three-fourths in value," been sufficiently attended to.

Judgment reserved.

*The LORD CHANCELLOR.*

July 30.

I must come to the conclusion in this case that the deed of the 12th of *December, 1863*, is invalid, not on the ground that the value of the security was not deducted from the secured debts, but upon other grounds, and amongst them one which was insisted on by Mr. *Reed*, viz. that even if the value of the security is to

(a) *Supra*, p. 36.

(b) 17 C. B., N. S. 15.

1864.  
  
*Ex parte*  
 SMITH.  
 In re  
 SMITH'S  
 TRUST DEED.

to be deducted (as I believe it is), the creditor must still be ranked in the number of creditors, although his security may reduce the amount of his debt to nothing. And if that course is taken in the present case, it will be found that there would not be a majority in number, even if it turned out that there was a majority in value.

All the doubts that have been expressed on this subject are referable to one single source, namely, a dictum attributed to a learned judge in a case, the reports of which are not in all respects alike (*a*). I do not accept that as any authority on the point, but shall decide that the value of the amount of the security is to be deducted, and that the residue represents the value of the debt in the view of the legislature as expressed in the Act of 1861.

Appeal dismissed.

(*a*) The judgments of both the Lords Justices in *Ex parte Godden*, as reported in this series (*supra*, p. 36), were printed from their Lordships' own written judgments.

With regard to the opinion expressed in the present case by the

Lord Chancellor as to the mode of dealing with secured creditors in reckoning the statutory majority of creditors, see *Whittaker v. Lowe*, 4 H. & C. 109; L. R. 1 Exch. 74, and *In re Stark*, L. R. 1 Chanc. App. 150.



1864.

Ex parte DOBSON.

In the Matter of CHARLES ANDERSON'S Trust  
Deed.

**MR. DE GEX**, on behalf of a debtor, who had executed a deed for the benefit of his creditors in the form given in schedule (D) to the Bankruptcy Act, 1861, and on behalf of the trustees of the deed, moved *ex parte* by way of appeal from the refusal of Mr. Commissioner *Goulburn* to allow as sufficient under the 200th section an affidavit of the circumstances of the case as dispensing with the necessity of obtaining the majority required by the 192nd section. The motion was also for an order for the registration of the deed *nunc pro tunc* as of the day on which the learned Commissioner refused to allow the affidavit and direct the registration.

July 30.  
Before The  
Lord  
Chancellor  
LORD  
WESTBURY.  
An affidavit made in support of an application to dispense with the requirements of the Bankruptcy Act, 1861, s. 192, on the ground that the circumstances of the case are within the 200th section of the act, must show such circumstances with greater certainty than by merely stating that the deponent is informed and verily believes them to be as stated.

The evidence which the Commissioner had considered insufficient was an affidavit in which the deponents, one of whom was the debtor, deposed that certain bills of exchange which had been accepted or indorsed by them (according to the exigency) in respect of certain specified debts referred to in the affidavit had been (*as the deponents had been informed and verily believed*) indorsed and paid away by the original holders, and that the deponents were unable to ascertain by whom such bills or certain other negotiable securities in the affidavit referred to were holden.

The LORD CHANCELLOR thought the affidavit insufficient, and dismissed the appeal.

1864.



Ex parte JOSEPH JONES

In the Matter of ROBERT MURRAY M'TURK,  
a Bankrupt.

And in the Matter of ROBERT MURRAY M'TURK'S  
Assignment.

July 30.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

The Court has no jurisdiction under a deed in the statutory form given in schedule (D) to the Bankruptcy Act, 1861, and executed by a debtor to make an order upon the trustees of the deed for payment out of the estate in their hands of a petitioning creditor's costs of an adjudication of bankruptcy against the debtor made after the execution of the deed, but subsequently annulled in consequence of the registration of the deed under the Bankruptcy Act, 1861, s. 192.

THIS was an appeal by the petitioning creditor from an order of Mr. Commissioner *Ayrton*, made on the 30th of *June*, 1864, refusing, with costs, a motion for an order upon the trustees of a deed in the form of the statutory deed given in the schedule (D) to the Bankruptcy Act, 1861, to pay the petitioning creditor's costs of a dismissed petition for adjudication out of the debtor's estate in their hands.

The deed was executed by the debtor on the 31st of *March*, 1864.

The Appellant, who was a dissentient from the arrangement contemplated by the deed, filed a petition for adjudication of bankruptcy against the debtor on the 4th of *April*, 1864, under which the latter was adjudicated bankrupt on the 6th of *April*, 1864; but proceedings in the adjudication were, in consequence of the existence of the deed and the probability of its ultimate registration under section 192 of the act, stayed from time to time, until on the 6th of *May*, 1864, the deed having then been registered under section 192, and the Commissioner being of opinion that all the requirements of the Act had been complied with, annulled the adjudication made on the 6th of *April*, 1864, and dismissed the petition for it.

The order thus made by the Commissioner was silent altogether

altogether as to the costs; nor were they asked for on behalf of the Appellant at the time when the order was made.

1864.  
  
 Ex parte  
 JONES.  
 In re  
 M'TURK.

The Appellant, on the 10th of *June*, 1864, made a separate application to the Court for an order upon the trustees of the deed for payment of his costs up to the adjudication out of the debtor's estate in their hands; and from the refusal, with costs, by the Commissioner (who had taken time to consider his judgment) of the application thus made, the Appellant now appealed.

Mr. *Sargood* for the Appellant, relied upon the *Bankruptcy Act*, 1861, ss. 197 and 213.

The LORD CHANCELLOR, without calling upon Mr. *Charles Hall*, who appeared for the trustees, thought that the 213th section of the act only gave jurisdiction to the Court to award costs in a subsisting bankruptcy or under a deed. In the present case the annulling order and dismissal of the petition for adjudication had done away with the bankruptcy; and the Court had no jurisdiction under the deed to make an order upon the trustees of the deed for payment out of the estate in their hands of costs incurred in the bankruptcy, which had been so done away with. The want of such a provision might be an unintentional omission in the act; but if so, it was one which the Court had no power to supply, whilst if the Court acceded to the argument of the Appellant, it would be encouraging every dissentient from a deed of arrangement to petition for an adjudication of bankruptcy against the debtor for the sake of costs. The appeal must be dismissed.

Mr *Charles Hall*, for the trustees, asked for the costs  
 of

1864.  
 Ex parte  
 JONES.  
 In re  
 M<sup>C</sup>TURK.

of the appeal, urging that the Appellant ought to pay them, he having made no application for his costs on the occasion of the application to dismiss the petition for adjudication.

*The* LORD CHANCELLOR was of that opinion and ordered accordingly.

Ex parte CHARLES MORRISON, JOHN DILLON,  
 GEORGE BROWN and ROBERT SLATER.

In the Matter of a Trust Deed made between EDWIN  
 JOHN HENRY CLUNN and Trustees for his  
 Creditors.

July 30.  
 Before *The*  
 Lord  
 Chancellor  
 LORD  
 WESTBURY.

Where a  
 debtor, being  
 sued by a  
 creditor on a  
 dishonoured  
 bill of ex-  
 change, and  
 having no  
 present assets,  
 and only the  
 deferred pos-  
 sibility of the  
 accrual of  
 a trifling sum  
 on a balance

THIS was an appeal by Messrs. *Morrison, Dillon & Co.* from the refusal of Mr. Commissioner *Fane* to allow them to issue process against the Respondent *Edwin John Henry Clunn*, notwithstanding the execution and registration by him under the Bankruptcy Act, 1861, s. 192, of a trust deed for the benefit of his creditors in the form given in schedule (D) to the Act.

At the date of the deed the Respondent was, and at the date of the application to the learned Commissioner he remained, indebted to the Appellants in the sum of 233*l.*, the amount of two bills of exchange dated respectively  
 of accounts between the debtor and his late partners, such possibility being dependent upon the result of legal proceedings taken by the partners to obtain relief against payments made by them, executed a trust deed in the form given in schedule (D) to the Bankruptcy Act, 1861, which was registered under the 192nd section of that act:—*Held*, that the deed was invalid as a fraud upon the act, and that a dissentient creditor ought to have leave to issue process against the debtor, notwithstanding the registration of the deed.

spectively the 22nd of *May*, 1863, and payable respectively six and eight months after date. These bills were drawn by the Respondent upon and accepted by one *Joseph Davison*, and were made payable to the order of the drawer, by whom they were indorsed to the Appellants. They were received by the Appellants in part compromise on the part of the Respondent of an action brought by them against a certain firm of *Clunn & Co.*, the members of which consisted (down to the 21st of *November*, 1862, when it was dissolved as to the Respondent) of the Respondent, his father *Thomas Clunn* and his brother *Thomas John Clunn*. The other partners defended the action on the ground that the guarantee of the firm, which constituted the ground of the action, had been given by the Respondent without authority. The Appellants, thinking it probable that the facts were as alleged, discontinued their action against the other partners, but continued it against the Respondent, who eventually, after some further and (as was alleged) vexatious resistance, compromised it on terms, part of which consisted of the delivery of the two bills above mentioned.

During the pendency of these proceedings and on the 17th of *February*, 1863, the Respondent by an indenture of that date made an absolute assignment of certain household furniture and effects to *Thomas Clunn*, *Thomas John Clunn* and *George Richard Clunn*, which was registered as a bill of sale. This indenture was not, however, particularly referred to in the evidence on the present application, except by a statement in the affidavit in support of the application on the authority of the trustees of the trust deed of the 12th of *December*, 1863, before mentioned, that the furniture included in the bill of sale was all that the Respondent possessed at the time.

1864.  
Ex parte  
MORRISON.  
In re  
CLUNN'S  
TRUST DEED.

The



1864.  
 Ex parte  
 MORRISON.  
 In re  
 CLUNN'S  
 TRUST DEED.

The first of the two bills given to the Appellants in compromise of their action against the Respondent arrived at maturity on the 25th of *November*, 1863, and was then dishonored.

On the 5th of *December*, 1863, the Appellants commenced proceedings against the Respondent in respect of the bill so dishonored.

On the 12th of *December*, 1863, the Respondent executed the trust deed, upon which the decision under appeal was founded. The trustees named in it were *Thomas Clunn* and one *Alfred John Clunn*, another of the Respondent's brothers.

The affidavit filed with the deed in pursuance of the General Order of 22nd *May*, 1862, stated that the total amount of the Respondent's debts was 15,453*l.* 2*s.* 1*d.*, and the total amount in value of assenting creditors (thirteen in number out of twenty-two in all) was 12,164*l.* 5*s.* 4*d.* Among the assenting creditors were reckoned *T. Clunn* and *T. J. Clunn* for 8,078*l.* 5*s.* 9*d.*, *T. Clunn* for 2,350*l.* and *A. J. Clunn* for 48*l.* 18*s.* 7*d.*

The Appellants were dissentients.

On the 4th of *March*, 1864, the solicitors of the Appellants wrote to the solicitors of the trustees of the trust deed, making inquiries as to the progress of the realisation of assets under the deed. The last-mentioned gentlemen on the 10th of *March*, 1864, replied simply that the trustees had no assets; and again on the 22nd of *March*, 1864, in reply to a further letter of the Appellants' solicitors, they wrote as follows :—

“ We repeat that there are no assets at present ; but we hope that on the estate being finally wound up (an event which

which cannot happen for a considerable time), there will be a fund to divide among the creditors. We are of opinion that the bill of sale to which you allude is good against the trustees, and would be good against assignees in bankruptcy."

1864.  
  
 Ex parte  
 MORRISON.  
 In re  
 CLUNN'S  
 TRUST DEED.

The bill of sale alluded to in this letter was that of the 17th of *February*, 1863, above mentioned.

The solicitors of the Appellants were subsequently informed by the solicitor of the trustees of the deed, that the only assets which could come to the estate of the Respondent, would arise in the following manner, viz :—that the debtor had improperly accepted bills in the name of his partnership firm, which bills he for his own private purposes had handed to persons from whom it was alleged he received no consideration ; that the remaining partners had been called upon to pay these bills, and that they had either paid or compromised all of them, and that they were then seeking to recover from the persons who had received the bills from the Respondent the amount which they had been called upon to pay, and that it was possible on that amount being received and the accounts taken between the partners a small sum might be coming to the Respondent.

Under these circumstances the Appellants made an application to Mr. Commissioner *Fane* for leave to issue process against the Respondent, notwithstanding his execution and the registration of the trust deed, and from the refusal of the learned Commissioner to accede to the application, the present appeal was brought.

Mr. *Sargood* appeared for the Appellants.

Mr. *Giffard* and Mr. *Bagley* for the Respondent.

For

1864.  
Ex parte  
MORRISON.  
In re  
CLUNN'S  
TRUST DEED.

For the Appellants, it was urged that this was a case of precisely the nature contemplated by the legislature, when, by the 198th section of the act, it reserved to the Court the power to permit the issue of process notwithstanding the existence of the deed; that the deed in the present case was in reality a mere sham and a fraud on the act of parliament, and that if such a deed executed under such circumstances were to be held valid, the penalties imposed by the Bankrupt Law would be rendered futile.

For the Respondent, it was contended that such deeds were very common and really gave up to creditors all the debtors had, whether much or little or nothing; that the want of assets in a bankruptcy, especially under the present state of the law, whereby bankruptcy and insolvency had been fused together, was no ground for refusing to release or discharge a debtor, and that the same principle ought equally to hold good in the case of a deed; that in the present case it was in evidence that there might be some assets, and that nothing could be gained by the present proceeding, the only object of which was not to impeach the validity of the deed, but to imprison the debtor, an object contrary to the policy of the law.

*The LORD CHANCELLOR.*

This is a fraudulent attempt to obtain a release of a debtor from his debts by an abuse of the act of parliament.

It is stated at the bar by the counsel for the Respondent that many deeds of this kind have been executed. If so, whenever a similar fraudulent attempt to abuse the provisions of the act is brought before me, I shall not be slow in applying a remedy.

It

It is argued on behalf of the Respondent that a man may have himself made a bankrupt, although not worth a penny, and that the condition in which the law allows that to be done. But a man who so applies the provisions of the act does so openly and without fraud, that is to say, without falsehood, without an attempt to pervert a section of the act of parliament given for one purpose to another and a different purpose. That constitutes fraud, and that makes the distinction between the two cases.

1864.  
  
 Ex parte  
 MORRISON.  
 In re  
 CLUNN'S  
 TRUST DEED.

The learned Commissioner's order must be reversed and the order made which was sought from him in the first instance. The deposit must also be returned to the Appellants. They have done service to the trading world by opposing this attempt to abuse the provisions of the act, and I am sorry that I cannot make an order to give them immunity from the expenses which they have incurred.



1864.

Nov. 16.  
Before The  
Lord  
Chancellor  
Lord  
Westbury.

The 194th section of the Bankruptcy Act, 1861, gives no jurisdiction to the Court of Bankruptcy to dispense with the fourth condition of the 192nd section requiring registration of a deed intended to bind a non-assenting minority of creditors within twenty-eight days from its execution by the debtor or to extend the time therein mentioned.

In the Matter of SKINNER.

THIS was an appeal on the part of a debtor, who had executed a trust deed for the benefit of his creditors, and the trustee of the deed, from the refusal of the Commissioner to allow the deed to be registered under the Bankruptcy Act, 1861, s. 192, *nunc pro tunc*, the twenty-eight days from the day of the execution of the deed by the debtor, limited by the 4th condition of that section, having expired.

The deed had been presented in due time for registration under the 192nd section, but had been refused by the officer whose duty it was to attend to the registration of deeds, on the ground that in the account of debts required by the General Order in Bankruptcy of 22nd May, 1862, to accompany the deed when left for registration, and which in this particular case was comprised in more than a single sheet, only the first sheet had been marked as an exhibit to the affidavit of verification required by the same general order to accompany the account.

The affidavit was resworn, and each sheet of the account properly marked as an exhibit to it; but in the meantime the twenty-eight days in question had elapsed, and registration of the deed *nunc pro tunc* was subsequently refused by the Court below as above mentioned.

From this refusal the present appeal was brought.

Mr.

Mr. *Charles Russell*, for the Appellants, contended that the 194th section of the act gave power to the Court to extend the time for the registration of deeds within, not merely the 194th section, but also the 192nd section, and that the present case was on its merits one for an order for extension of the time for registration, or an order for registration *nunc pro tunc*.

1864.  
In re  
SKINNER.

He cited *Re a Trust Deed* (a); *Wishart v. Fowler* (b); *Re Simpson* (c).

*The LORD CHANCELLOR* said he was clearly of opinion that the 194th section of the act gave no jurisdiction to the Court to dispense with the 4th condition of the 192nd section, and his Lordship refused the application but allowed the Appellants to take back the deposit and to have an order for registration of the deed under the 194th section of the act.

(a) 10 *L. T. (N. S.)* 245.

(c) 12 *W. R.* 351.

(b) 4 *B. & S.* 674.



1864.

Ex parte THOMAS BAYLEY POTTER and  
FRANCIS TAYLOR.

In the Matter of EDWARD GEORGE BARRON  
the younger, a Bankrupt.

Nov. 23.

Dec. 7.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

An instrument purporting to be a deed of assignment of all a debtor's estate and effects for the benefit of his creditors, and signed by the debtor, is inadmissible as evidence of an act of bankruptcy on his part, if unstamped. Ex parte *Wensley* (1 De G., J. & S. 273) doubted.

Remarks as to the nature of the case which should be made by a creditor of a bankrupt who seeks (by petition) without the consent of any party interested to annul an adjudication made on the bankrupt's

petition, and to obtain an adjudication of his own relating to an act of bankruptcy earlier than the debtor's petition.

THIS was an appeal on the part of Messrs. *Thomas Bayley Potter* and *Francis Taylor*, who carried on business together in co-partnership, and as such co-partners were creditors of the Respondent, the bankrupt, from an order of Mr. Commissioner *Goulburn* dismissing a petition presented by them for the annulment of the existing adjudication of bankruptcy, and the dismissal of the petition on which it was founded (such petition being the bankrupt's own), the Appellants undertaking immediately upon such dismissal to present a petition by themselves and apply for an adjudication of bankruptcy against the bankrupt.

The petition on which the order under appeal was made, and which was verified by the affidavit of Mr. *Taylor*, alleged in effect the indebtedness of the bankrupt to the Appellants; that by an indenture dated the 13th of *June*, 1864, the bankrupt assigned and transferred to *Cornelius Turner*, *Wilson Woodhead* and *George Whitehouse* all his estate and effects in trust for the creditors of the bankrupt; that the Appellants, although the largest creditors of the bankrupt, had not been consulted in the matter of this assignment, or had had its existence notified to them; that on the 17th of *June*, 1864, the bankrupt was so adjudicated on his own petition

petition that day filed; that the Appellants had been informed and verily believed it to be true that shortly before his bankruptcy the bankrupt transferred to a person named *Taylor* a quantity of goods by way of preference, and that they were advised and believed that various questions might arise as to this preference and the deed of assignment and its validity as against the assignees of the estate and effects of the bankrupt thereunder, which could not properly be brought before the Court under the petition filed by the bankrupt, and that the Appellants were anxious that an investigation should be made with reference to the bankrupt's dealings and transactions, and that for this purpose it would be desirable, with a view to invalidate such assignment and to recover the goods so transferred by way of preference, and to make such investigations as aforesaid, that an adjudication of bankruptcy should be obtained against the bankrupt under a petition to be presented by a creditor or creditors of the bankrupt, and which investigation the Appellants were advised and believed could be more readily made under an adjudication to be obtained as last aforesaid, and that the Appellants were prepared to file such petition on their own behalf and to proceed to adjudication thereon.

The prayer of the petition was to the effect already stated.

Mr. *Little* for the Appellants.

[*The LORD CHANCELLOR* asked whether the Court could annul the existing adjudication of bankruptcy against the bankrupt on a mere undertaking to file a petition for a new adjudication without being satisfied that a new adjudication would be obtained.]

He referred to *Ex parte Taylor* (a).

(a) *De G., M. & G.* 737; *S. C.*, *De G., M. & G.*, *Bank. App.* 68.

N 2

1864.

Ex parte  
POTTER.

In re  
BARRON.



1864.

Ex parte  
POTTER.In re  
BARRON.

[The LORD CHANCELLOR adverted to the want of precision in the allegations of the petition as to the specific act of bankruptcy relied upon by the Appellants, and said that it should have been shown, or at any rate suggested, with greater clearness by the petition than had been done, that in the interval between the date of the act of bankruptcy relied on and the date to which the adjudication already here existing related, viz.:—the 17th of *June*, 1864, the bankrupt had parted with property which could not be reached by the assignees under the present adjudication. His Lordship said that he could not accept a bare possibility of there being a prior act of bankruptcy to which a new petition might relate back; and that so far as at present appeared no greater benefit seemed likely to result to the creditors from an adjudication to be made as proposed by the Appellants than could be obtained under the existing adjudication.]

Mr. *Little*. The assignment of the 13th of *June*, 1864, is alleged in the petition, and that with sufficient precision to show that its execution by the bankrupt was an act of bankruptcy on his part which would go further back in point of time than the present adjudication. *Tappenden v. Burgess* (a).

[Mr. *Sargood*, for the bankrupt, pointed out that the assignment in question, although executed by the bankrupt, had never been either stamped as an ordinary deed or registered under the Bankruptcy Act, 1861, and being produced in Court and examined it bore out that statement. Its frame was that given in schedule (D) to the Bankruptcy Act, 1861.]

[Upon these facts appearing, Mr. *Little*, after referring to

(a) 4 *East*, 230.

to *Re Mew and Thorne* (a), with reference to the objections to which the assignment was exposed if sought to be used as an actual assignment and an act of bankruptcy on the part of the assignor by reason of its not being stamped, asked for time to search for further authorities on the point.]

1864.  
Ex parte  
POTTER.  
In re  
BARRON.

The case accordingly stood over for that purpose, the Lord Chancellor saying that he should not be disposed (subject to what the Respondents might have to say on the subject) to dismiss the petition on merely technical or formal grounds. The Appellants would have to show that the execution by the bankrupt of the so-called deed of assignment in its actual condition was, as opposed to what it might be made by subsequent stamping, an act of bankruptcy on his part, or they must, (and they might take leave so to do by affidavit,) show some other sufficient act of bankruptcy relating further back in point of time than did the existing adjudication, under which assets might be reached which could not be reached under the existing adjudication.

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The argument was resumed on this day as to the validity of the assignment as an act of bankruptcy. No further evidence had been adduced as to the existence of any prior act of bankruptcy.

Dec. 7.

Mr. *Little* again referred in support of his argument to the case of *Tappenden v. Burgess* as to the execution of the assignment being an act of bankruptcy, and to the case of *Re Mew and Thorne* (a) as to the deed being received in evidence as an act of bankruptcy, in addition to which he referred to *Ex parte Wensley* (b), (which he

(a) 5 L. T., N. S. 435.

(b) *Supra*, p. 49.

1864.

Ex parte  
POTTER.In re  
BARRON.

he inadvertently cited as a decision of Lord *Campbell*,) and he contended that these cases showed that for the purpose in question a deed might be received in evidence though not registered as required by the Bankruptcy Act, 1861, and that à fortiori it should be received where the only objection to it was the want of a stamp, since that objection could (such was the advance in the leniency of the law in its treatment of unstamped deeds, which was traceable through the various statutes 5 *W. & M.* c. 21, s. 11; 13 & 14 *Vict.* c. 97, s. 12; 17 & 18 *Vict.* c. 125, ss. 28, 29) be removed or obviated by a subsequent stamping accompanied by the payment of a penalty. He contended that as the bankrupt had in this case parted with all his estate by a deed effectual at common law, he had thereby committed an act of bankruptcy.

Mr. *Sargood* for the bankrupt, and Mr. *W. F. Robinson* for Messrs. *Cornelius Turner* and *George Whitehouse*, (who were co-assignees with the Appellant Mr. *Francis Taylor*, but dissented from the present proceedings,) were not called on.

*The* LORD CHANCELLOR.

The act of bankruptcy alleged as the foundation for this petition is an assignment by the debtor of all his property for the benefit of his creditors. That assignment, it is said, had been intended to have the character of a trust deed and to be registered under the provisions of the Bankruptcy Act, 1861. It has not, however, been proceeded with, inasmuch as the requisite assents of creditors were not obtained, and the deed has never been stamped. It must be treated, therefore, as a blank sheet of paper signed by the debtor.

The

The proposition undertaken to be maintained by the Counsel for the Appellants before me, and urged before the learned Commissioner, was, that an instrument in this condition operated as a conveyance, and that this deed in its blank state was a complete assignment of the bankrupt's property anterior in point of date to the existing adjudication.

1864.

Ex parte  
POTTER.  
In re  
BARRON.

The law on the subject is clear. The law, it is true, allows an unstamped deed to be admitted in evidence upon certain things being done. But the question here is, whether this was a valid deed prior to the adjudication of bankruptcy.

The Statute of *William & Mary* (a), enacts, and the provision is repeated by the subsequent statutes, that no unstamped deed shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or equity, until as well the duty imposed by the statute as the sum of 5*l.* shall be first paid, and until the stamp be affixed. The statute of *George* 1st (b) is in similar terms. The subsequent statute of the Queen (c) enacts, that no deed or instrument requiring a stamp, but actually unstamped, shall be pleaded or given in evidence or admitted to be good, useful or available in law or equity until the same shall be duly stamped as required by the act.

Whether the parties in the present case might have gone with this instrument and got it stamped and brought it back to the Commissioner, and if they had done so what the Commissioner would then have done, are questions which I need not consider. For what was actually

(a) 5 *W. & M.* c. 21, s. 11.

(c) 13 & 14 *Vict.* c. 97, s. 12.

(b) 12 *Geo.* 1, c. 33, s. 8.

1864.

Ex parte  
POTTER.

In re  
BARRON.

actually done was this:—the instrument was produced to the Commissioner as having been an effectual conveyance of the debtor's property, and consequently as proof of an act of bankruptcy committed by him anterior to the adjudication which the Commissioner had made.

But under those circumstances and by virtue of the statutes to which I have referred the absence of the stamp deprived the Commissioner of the power of looking at the instrument; and upon the proposition submitted to him, I think he was right in refusing to recognise any such conveyance, or any such effect or operation, and in ignoring the instrument.

The Appellants consequently failed *in limine* in proving any act of bankruptcy. And it is, therefore, unnecessary for me to refer to the language of the Bankruptcy Act, 1861, ss. 192, 194, in connection with this subject. I am not, however, satisfied as to the correctness of the decision in *Ex parte Wensley* which has been cited. I think that I should require considerable argument before I should be prepared to support it (a).

The present appeal must be dismissed with costs.

(a) See, however, *Ponsford v. above reported, was referred to.*  
*Walton, L. R., 3 C. P. 167,* See also *Hobson v. Thelluson,*  
 where *Ex parte Wensley* was fol- *L. R., 2 Q. B. 642.*  
 lowed, although *Ex parte Potter,*

1864.

Ex parte KING.

In the Matter of KING'S Trust Deed.

THIS was an appeal from the refusal of Mr. Registrar *Winslow*, acting as Commissioner, to direct the registration of a trust deed for the benefit of creditors under the Bankruptcy Act, 1861, s. 192, although only executed by two of the three trustees appointed by the deed.

The deed had been executed by debtors in pursuance of the resolution of a meeting of their creditors, and the name of a Mr. *Booth* had been inserted in the deed as that of one of the trustees, in consequence of a suggestion to that effect made by his solicitor in his absence at and adopted by the meeting.

Mr. *Booth*, however, had not given his solicitor any authority to make the suggestion in consequence of which his name was so inserted in the deed as that of a trustee, and he refused to execute the deed when presented to him for the purpose.

Two other gentlemen whose names had been associated with that of Mr. *Booth* in the deed as those of trustees had both executed the deed.

In that condition, so far as regarded the persons appointed by it trustees, the deed was presented for registration under the 192nd section of the act. The officer, however, whose duty it was to receive it, conceiving that the 2nd condition of the 192nd section had

Dec. 17.

Before The

Lord

Chancellor

LORD

WESTBURY.

The Court of Bankruptcy has no power to dispense with the execution of a deed intended for registration under the Bankruptcy Act, 1861, s. 192, by one out of several trustees appointed by the deed. A deed imperfect in that respect does not fulfil the statutory requirements of the section and cannot be registered thereunder.

1864.  
 Ex parte  
 KING.  
 In re  
 KING'S  
 TRUST DEED.

had not been complied with, declined to receive it; and the Deputy Commissioner, on application made to him to dispense with Mr. *Booth's* execution of the deed, took the same view of the matter, and refused to accede to the application.

From this refusal the present appeal was presented.

- Mr. *Reed* appeared in it on behalf of the debtors = =, the two trustees who had executed the deed, and certain creditors.

*The LORD CHANCELLOR.*

I cannot do anything in this matter. It is unfortunate that the creditors entertained the suggestion made to them at the meeting by Mr. *Booth's* solicitor, without first ascertaining whether that gentleman had given his assent. As it is, they merely assumed that something would be done which has not been in fact done.

The provisions of the act of parliament must be followed expressly, and were I to accede to this application I should be simply repealing one of those provisions. Under them, until a trustee or trustees appointed by a deed intended for registration under the 192nd section has or have executed the same, it does not fulfil the requisites imposed by the legislature. The deed, therefore, in the present case is not such a deed as the legislature contemplated; it has not been registered and its registration would have been improper.

I must refuse this application, but the deposit will be returned.

1864.

Ex parte GROOME.

In the Matter of GROOME'S Trust Deed.

**T**HIS was an appeal from the decision of the Commissioner refusing to allow as sufficient an affidavit stating the circumstances relied upon as grounds for dispensing with the assent of the whole statutory three-fourths of the creditors to a trust deed for the benefit of creditors executed by a debtor in the form given in schedule (D) to the Bankruptcy Act, 1861. The affidavit is required by the 200th section of that act to state the circumstances of the case whereby the debtor cannot obtain the assent to the deed of the statutory majority of creditors prescribed by the 192nd section. The affidavit in the present case stated that the debtor was unable to obtain that majority by reason of his being unable to ascertain by whom bills of exchange accepted by him were holden, but did not give the particulars of the bills.

Dec. 17.  
Before *The*  
*Lord*  
*Chancellor*  
*LORD*  
*WESTBURY.*

The affidavit required by the Bankruptcy Act, 1861, s. 200, should state with particularity the matters to which it is directed.

Mr. *Bacon* on behalf of the debtor.

*The LORD CHANCELLOR* held that the affidavit was insufficient, and dismissed the appeal (a).

(a) See *Ex parte Dobson*, supra, p. 167.





1865.



Ex parte PHINEAS ALEXANDER RYRIE  
OLDFIELD, HAROLD LITLEDALÉ and  
EDWARD GREY.

In the Matter of PHINEAS ALEXANDER RYRIE  
OLDFIELD, a Bankrupt.

Jan. 19.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

A trust deed for the benefit of creditors intended to be executed by debtors in business together as copartners and to be brought within the provisions of the Bankruptcy Act, 1861, s. 192, is properly framed when its terms embrace all possible estate and property which not only does but also may or might belong to the partners jointly or to either of them separately.

The non-existence in point of fact of any separate estate of either debtor is no objection to the validity under the Bankruptcy Act, 1861, s. 192, of a trust deed so framed, even as against a non-assenting separate creditor.

Seemle that in computing the statutory majority of assenting creditors to a deed under the Bankruptcy Act, 1861, s. 192, executed by debtors in trade in copartnership, the separate creditors are not to be consulted separately in respect of the separate estate but that the whole body of the creditors is to deliberate and decide together, and that separate creditors might constitute a majority even if there were no separate estate.

THIS was an appeal on the part of the bankrupt and Messrs. *Littledale* and *Grey*, who were the trustees of a trust deed which had been executed by him and his partner *William Thomson*, from the refusal of Mr. Commissioner *Perry* to stay all proceedings under the petition for adjudication, and to dismiss the petition.

On the 5th of *November*, 1864, *William Thomson* and the bankrupt as partners executed a deed of that date, which was expressed to be made between them of the first part, the Appellants *Littledale* and *Grey* of the second part, and the several other persons, firms and companies whose names were thereunto subscribed, and all other persons, firms and companies being at the date of the deed creditors jointly or severally of *William Thomson* and the bankrupt and who would be entitled to prove under an adjudication of bankruptcy against them or either of them founded on a petition filed on the day of the date thereof, of the third part.

It contained no recitals, and by its terms the debtors  
and

and each of them conveyed and assigned all their and each of their estate and effects to the Appellants *Little-dale* and *Grey* absolutely, to be applied and administered for the benefit of the joint and separate creditors of *William Thomson* and the bankrupt in like manner as if they had been at the date thereof duly adjudged bankrupt; and this operative part was followed in the deed by a release of the debtors, with a reservation of the rights of creditors as regarded securities.

On the 18th of *November*, 1864, the bankrupt signed an admission of a debt in respect of which one *Kenneth Powles*, one of his separate creditors, had obtained a trader debtor summons against him. The bankrupt did not within seven days after such admission discharge or secure the debt, and was consequently upon the petition of Mr. *Powles*, founded on such default as an act of bankruptcy, adjudicated bankrupt by the Court of Bankruptcy for the *Liverpool* district on the 28th of *November*, 1864.

In the meantime, however, and on the 24th of *November*, 1864, and before the presentation of the petition for adjudication, the trust deed of the 5th of *November*, 1864, was registered under the Bankruptcy Act, 1861, s. 192.

From the accounts and affidavits and declarations filed with the deed in pursuance of the General Order in Bankruptcy of *May* 22nd, 1862, it appeared that there was a statutory majority of assenting creditors to the deed of each description, viz. of the joint creditors of *William Thomson* and the bankrupt, and of the separate creditors of each of them. Mr. *Powles*, the petitioning creditor, was the only one out of six separate creditors of the bankrupt who did not assent to the deed.

1865.  
  
 Ex parte  
 OLDFIELD.  
 In re  
 OLDFIELD.

It

1865.  
Ex parte  
OLDFIELD.  
In re  
OLDFIELD.

It further appeared from the same documents that neither of the debtors had any separate estate or property whatever.

Under these circumstances, and on the ground of the execution by the bankrupt of the trust deed and its registration in manner aforesaid prior to the presentation of the petition for adjudication, the application, of which the purport is stated above, was on the 13th of *December*, 1864, made to the learned Commissioner and refused; the reason for such refusal stated in his Honor's order as drawn up being that the trust deed was invalid as against the petitioning creditor, on the ground that by the terms of it the separate property of the bankrupt was assigned and directed to be administered for the benefit of the separate creditors in like manner as if the bankrupt had been at the date of the deed adjudged bankrupt, when in point of fact there was no separate property to be assigned or administered.

The bankrupt was examined before the Commissioner on behalf of Mr. *Powles*, and admitted that he knew that he had no separate property at the time when he made the assignment.

Mr. *Bardswell* (with him Mr. *Bacon*), in support of the appeal, was stopped in his argument.

Mr. *North*, for the Respondent Mr. *Powles*, supported the view of the learned Commissioner, arguing that there having been no separate property of the bankrupt to his knowledge at the date of his executing the trust deed, the assignment of his separate property purported to be made by such deed was a mere pretence, and the deed consequently a mere vehicle for a false representation,

tion, and within the principle of the decision in *Ex parte Morrison* (a), and invalid against the petitioning creditor as a non-assentient separate creditor. It was further contended that the absence of separate estate deprived the separate creditors of any substantial stake in the matter, in respect of which stake their assents as those of separate creditors and in respect of the separate estate could be reckoned with a view to the constitution of the requisite statutory majority.

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*Ex parte*  
 OLDFIELD.  
 In re  
 OLDFIELD.

A reply was not heard.

*The* LORD CHANCELLOR.

I am at a loss to understand the grounds of the learned Commissioner's decision.

An objection has been urged with much ingenuity at the bar turning upon the frame of the deed. It is said that there is a statement in the deed of the existence of a separate estate belonging to the partner who has been adjudged a bankrupt, whereas in reality there is no such separate estate, and that consequently the deed contains a false representation.

The deed, however, contains no allegation as to the existence of separate estate, and I think that its frame in this respect is correct. Its terms are framed so as to embrace all possible estate and property which might belong to the partners jointly or to either of them separately. It may be that either partner is possessed in some manner, possibly unknown to himself, of separate estate, and it would be wrong to adopt any form of words which

(a) *Supra*, p. 170.

1865.  
Ex parte  
OLDFIELD.  
In re  
OLDFIELD.

which would not embrace that existing, or possibly existing, present or future interest.

Another objection to the validity of this deed, grounded also upon the absence of separate estate in the present case, is, that the separate creditors could not in such circumstances have exercised any deliberation which could tend to bind a minority.

But the act of parliament does not in a matter of this kind contemplate separate creditors being consulted separately in respect of the separate estate. By the provisions of the statute the whole body of the creditors is to deliberate and decide together; nor is there anything to warrant the conclusion that separate creditors might not constitute a majority, even if there were no separate estate.

The learned Commissioner's decision appears to me to be unsustainable, and I must reverse his order and grant the relief which was sought at his hands.

---

By his Lordship's order as drawn up the learned Commissioner's order was discharged; and the Respondent by his counsel not objecting, the adjudication against the bankrupt was annulled, and the deposit ordered to be returned.

---

1864.

Ex parte JAMES ELLERTON.

In the Matter of JOHN ANGELL LEECH,  
a Bankrupt.

**T**HIS was an appeal on the part of the creditors' assignee from an order of Mr. Commissioner *Fane*, under the Bankrupt Law Consolidation Act, 1849, s. 194, for an allowance to the bankrupt out of his estate for the support of himself and his family prior to his passing his last examination.

The first meeting of creditors had been held, but the power given by the Bankruptcy Act, 1861, s. 109, to a majority in value of the creditors present thereat to determine whether any or what allowance should be made to the bankrupt up to the time of passing his last examination had not been exercised.

Under these circumstances the learned Commissioner made the order under appeal.

Mr. *De Gex* for the Appellant.

The objects of the legislature in passing the enactment contained in the concluding words of the 109th section of the Bankruptcy Act, 1861, sufficiently appear from one of the notes to *Hazlitt and Roche's Bankruptcy Act*, 1861 (a). One of the learned Commissioners in bankruptcy has indeed held that the Court still has the power of making an allowance to the bankrupt out of

Apr. 30.  
Before *The Lord Chancellor*  
LORD  
WESTBURY.  
The power given to the Court of Bankruptcy by the Bankrupt Law Consolidation Act, 1849, s. 194, of making an allowance to a bankrupt out of his estate for the support of himself and his family prior to his passing his last examination, still exists, subject only to be displaced by the exercise by a majority of creditors present at the first meeting after adjudication of the controlling power given by the Bankruptcy Act, 1861, s. 109.

his

(a) Page 108, note.

1864.  
 ~~~~~  
 Ex parte
 ELLERTON.
 In re
 LEECH.

his estate previously to his passing his last examination; *Re Smith(a)*. And it is true that the 194th section of the Bankrupt Law Consolidation Act is not expressly repealed by the Act of 1861. But the inference therefrom is not that the Court is to retain for an indefinite time concurrent authority with the creditors in these matters, but that the object of the legislature was to allow things to remain on their former footing until the first meeting of creditors had been held, and that after that time the new state of things was to come into operation.

Mr. *Horsey*, for the Respondent the bankrupt, was not called upon.

The LORD CHANCELLOR.

The 194th section of the Act of 1849 not being included in the schedule to the Act of 1861 as repealed, but left still operative, it was plainly the intention of the legislature that that section should be acted upon in some cases. The reasonable interpretation of the two enactments when taken together is, that the power given to the Commissioner by the 194th section of the Act of 1849 is subjected to the controlling power given to a majority of creditors present at a meeting directed to be held by the 109th section of the Act of 1861; so that if those creditors come to any determination on the subject, their determination supersedes the authority of the Commissioner. The matter, in fact, then becomes *res judicata*, and there is no longer any room for the exercise of the Commissioner's judicial authority.

But I cannot accept the fact of the creditors having
 given

(a) 7 L. T. (N. S.) 225.

given no opinion as equivalent to their having come to a determination in the negative. If they had expressly resolved to make no allowance or an allowance of any specified amount, the case would no longer have fallen within the scope of the 194th section of the Act of 1849. But as they have been silent on the matter, as they have not exercised the power of control given to them by the 109th section of the Act of 1861, the case is left to be dealt with, in accordance with what I must take to have been the intention of these creditors, by the law which still remains unrepealed, and, therefore, in full operation. It was not thought desirable to take away altogether the power given to the Commissioner by the 194th section of the Act of 1849. But it was thought desirable to subordinate its exercise to the judgment of the creditors, which in the present instance has not been exercised.

1864.
Ex parte
ELLESTON.
In re
LEECH.

That being so, I think that the learned Commissioner had the power to make the order under appeal, and that having the power, he has exercised it in a moderate way. I think, therefore, his order should not be disturbed.

It was right, however, to bring the matter before the Court; and, consequently, while dismissing the appeal I do so allowing the costs of both parties out of the estate and the return of the deposit.

NOTE.—See *Ex parte Lovell*, L. R., 1 Ch. App. 134.



1865.

Ex parte GIBBINS.

In re GIBBINS' Trust Deed.

July 26.

Before The
Lord
Chancellor
LORD

CRANWORTH.

A deed for the benefit of creditors operating under the Bankruptcy Act, 1861, s. 192, is to be looked upon in the light of a contract between the debtor and his creditors, and stipulations not made by the parties themselves cannot be imported into it by the Court.

Therefore if it is intended that an allowance shall be made to the debtor out of the net produce of the realisation of his estate in proportion to the amount of dividends yielded by it, a stipulation to

that effect must be inserted in the deed, and cannot be imported into it under the Bankrupt Law Consolidation Act, 1849, s. 195, by any incorporation with the deed of the provisions of the Bankruptcy Act, 1861, s. 197.

To obtain an allowance under the 195th section of the act of 1849 a bankrupt must not only have a sufficient estate but must also have obtained his certificate.

THIS was an appeal on the part of a debtor, Mr. Gibbins, who had executed and registered, under the Bankruptcy Act, 1861, s. 192, a trust deed in the form given in schedule (D) to the Act, from the decision of Mr. Commissioner *Holroyd* holding the Appellant not to be entitled to an allowance proportioned to the net produce of his estate realised under the deed in accordance with the 195th section of the Bankrupt Law Consolidation Act, 1849.

Mr. *De Gex* for the Appellant.

The 197th section of the Bankruptcy Act, 1861, provides thus:—"And the existing or future trustees of any such deed or instrument and the creditors shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt or his acts, estate and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy

bankruptcy so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt and his estate were administered in bankruptcy." This is a new and independent sentence, and applies not only to the debtor's estate and effects but also to his person; and where, as the Appellant has done here, he has ceded everything to his creditors, as in bankruptcy, he is entitled to all a bankrupt's rights, one of which is an allowance under the Bankrupt Law Consolidation Act, s. 195, proportioned to the net produce of his estate realised under the deed. It will be argued, perhaps, that that section requires the bankrupt who seeks an allowance under it to have obtained a certificate, following the older law on the subject, *Ex parte Grier* (a); *Ex parte Gregg* (b), and that as certificates have been abolished, so that even bankrupts cannot obtain them, it follows that neither bankrupts nor debtors who have executed and registered deeds under the 192nd section of the Act of 1861 are entitled to an allowance. But it has been held that the 194th section of the Act of 1849 is not impliedly repealed by the 109th section of the Act of 1861, *Ex parte Ellerton* (c), and so neither is the 195th section of the Act of 1849 impliedly repealed by the 174th section of the Act of 1861. Effect must therefore be given to it in the case of trust deeds, so far as may be; and as the qualification with regard to the certificate is not in form applicable to trust deeds or required under them, but is replaced by different and equivalent provisions, that formality should be dispensed with. The legislature evidently intended in passing the Act of 1861 to assimilate the position of a debtor under the circumstances of the Appellant here to that of a bankrupt.

1865.

Ex parte
GIBBINS.
 In re
GIBBINS'
TRUST DEED.

Mr.

(a) 1 *Atk.* 207.

(b) 6 *Ves.* 238.

(c) *Supra*, p. 193.

1865.

Ex parte
GIBBINS.
In re
GIBBINS'
TRUST DEED.

Mr. *Sargood* for the Respondents, the trustees of the deed.

The 195th section of the Bankrupt Law Consolidation Act, 1849, requires for its application the fulfilment of two conditions, neither of which has been fulfilled here, viz:—the existence of a bankruptcy, and of a certificate; and with the abolition of certificates, the grant of one of which is a condition precedent to the grant of an allowance under the section in question, the section itself is virtually repealed, not, however, without giving the means of giving an allowance to a bankrupt who deserves it under the 174th section of the Act of 1861. But even while the enactment of the former section was in force in cases of bankruptcy the allowance was not simply an indefeasible right of the bankrupt, as from the report of the case in *Ex parte Grier* might have been the case under the statute then in force, but it was subject to reduction under the concluding words of the 195th section of the Act of 1849 according to the class of certificate obtained by the bankrupt; in other words, according to his conduct, upon which depended the nature of his certificate. But in the case of a debtor arranging by deed who might, if he had been a bankrupt, have failed altogether in obtaining a certificate of any class, the Act of 1861 provides no means for conducting an inquiry into conduct, the 197th section having nothing to do with his conduct but merely with the Court's jurisdiction in the administration of his estate for the benefit of his creditors. In point of fact, in the case of an arrangement apart from bankruptcy, the grant of an allowance is a mere element in the contract between the debtor and his creditors, a contract defined by the deed. And the contract in the present case is the acceptance by the creditors of an assignment of the whole estate, and not an assignment of that estate lessened

lessened by payments to be made thereout to the debtor by way of allowance, which being a matter relating to the debtor personally is not within the scope of the 197th section, which relates to his estate and effects merely.

1865.

 Ex parte
 GIBBINS.
 In re
 GIBBINS'
 TRUST DEED.

Mr. *De Gez* in reply.

The grant of an allowance to the debtor is a question relating to the administration of the estate under the deed, and falls consequently within the scope of the 197th section of the Act of 1861.

The LORD CHANCELLOR.

I should have been glad to accede to this application, had I been able to see my way to do so. But I think a deed of this kind must be looked upon in the light of a contract between the debtor and his creditors, and that stipulations not made by the parties themselves cannot be imported into it by the Court.

[His Lordship then adverted to the terms of the Bankruptcy Act, 1861, ss. 194 and 197, and the argument founded thereon advanced on the part of the Appellant, and continued thus:—

Even assuming that the second branch of the 197th section extends to the person as well as to the estate of the debtor, it is a matter not of mere form but of substance, that a person subject to the bankrupt law who is to obtain an allowance under the Bankrupt Law Consolidation Act, 1849, s. 195, must not only have an estate the net produce of which has paid the prescribed dividend, but he must also have obtained his certificate.

I cannot believe it to have been the intention of the legislature, that if a debtor's estate under a trust deed
 realises


1865.


Ex parte
GIBBINS.In re
GIBBINS'
TRUST DEED.

realises the requisite amount in the way of dividend, the debtor is to be entitled, in the absence of any contract to that effect, to an allowance proportioned to the net produce of the realisation of the estate under the deed.

I think that the legislature rather intended to leave it to the parties themselves to make their own arrangements upon such points. The deed would possibly have been equally good had it contained such a stipulation as is here contended for. But to construe the act otherwise than I have said, would be to import a new term into the trust deed, to impute to these parties an intention which they have not expressed.

I must therefore affirm the learned Commissioner's order and dismiss the appeal.



- [illegible]

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1862.



In the Matter of THE GREAT NORTHERN AND
MIDLAND COAL COMPANY (LIMITED).

CURRIE'S CASE.

Nov. 7, 8, 13,
22.

1863.

Apr. 24.

May 1, 8, 22.

Before The
LORDS JUSTICES.

THIS was an appeal by Captain *Mark John Currie* and Messrs. *Henry Jeffreys Longcluse, Walter Fitzpatrick, George Cyprian Hacker* and *William Ricketts Parker* from an order of Mr. Commissioner *Goulburn* settling the Appellants on the list of contributories in the winding-up of the above-mentioned company, and making under a general call order a call upon them in respect of shares held by them respectively under each of the following categories, viz.:—

Directors of a company registered in 1860 took a transfer of paid-up shares from an allottee who had had them allotted to him by the company in part payment of purchase-money in respect of property

(a) One hundred shares transferred to each of them by one *George Butcher* out of a larger number of shares originally

purchased by the company. The same directors were holders of other paid-up shares taken by them for attendance fees. The validity of the purchase in the one case and the allowance of attendance fees in the other were impugned:—*Held*, that the transactions could not be affirmed in part and repudiated in part, and that consequently the directors, if treated as shareholders at all, must be treated as paid-up shareholders, and not placed on the list of contributories in either case.

Prior to the formation of the company the directors in question had agreed each to take 100 shares in the company and to execute the articles and memorandum of association when ready and to act as directors of the company, and the articles provided that the subscribers of the memorandum should be deemed to be directors until others were appointed, and that each director should hold at least 100 shares:—*Held*,

(1.) That their obligation to take the qualification shares could not be satisfied by their taking the unpaid-for shares.

(2.) That the case was distinguishable from *Lord Abercorn's Case*, *In re The National Insurance and Investment Association*, 4 De G., F. & J. 78.

(3.) That the directors were liable to be put on the list as contributories for their respective qualification shares.

(4.) That they were also held liable to be put on the list as contributories in respect of the shares for which they had respectively subscribed the memorandum of association, but that these were to be taken as part of the qualification shares.

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P

D.J.S.

1862.
In re
GREAT
NORTHERN
AND MIDLAND
COAL CO.
CURRIE'S
CASE.

originally allotted to him under the authority given by the articles of association of the company as paid-up shares, in part of the consideration of a purchase made by the directors from him.

(b) Shares taken by each of them in respect of attendance fees which they, with others, as de facto directors of the company, but without any authority under the articles of association or resolution of general meeting of the shareholders, voted to themselves by a resolution dated the 15th of *January*, 1861, and paid practically, in default of money, by appropriating paid-up shares in the company to the required amount, the form of the transaction being that cheques were drawn upon the company's bankers for the amounts of the fees, which the recipients paid again to the company's bankers to its credit, taking in exchange for so doing an allotment made by themselves and their colleagues of a proportionate number of paid-up shares in the company.

(c) Shares for which the Appellants who were five out of the seven subscribers of the memorandum and articles of association of the company had signed the memorandum.

The company was registered on the 31st of *August*, 1860.

The winding-up petition was presented in *December*, 1861.

The validity of the purchase from *Butcher* was in dispute, as was also the legality of the payment of directors' attendance fees, without the sanction of a general meeting of the company, which had never been obtained.

The 3rd clause of the articles of association authorized
the

the company to purchase a business from *Butcher*, and to pay him in part of his purchase-money a certain number of fully paid-up shares in the company.

The 21st clause exempted from forfeiture for non-payment of calls (amongst other shares) the shares to be given to *Butcher*; and it was declared, that the shares so exempted were to be fully paid-up shares and not to be subject to any call or liability in respect thereof.

With respect to the shares in category (c), each of the Appellants had signed the memorandum of association for twenty-one shares, but Captain *Currie* had parted with some of those for which he had so signed.

Mr. Daniel and *Mr. Hardy* for the Appellants.

As to the shares in category (a), they are paid-up shares; and even if the Appellants are properly considered to be contributories in respect thereof, still the 3rd and 21st clauses of the articles of association prevent any call being made in respect of them. As to the shares in category (b), they stand on the same footing, being paid-up shares. As to those in category (c), the Appellants are entitled to set-off against them the shares in categories (a) and (b) respectively which have been transferred and allotted to and accepted by them.

Mr. Bacon and *Mr. Roxburgh*, for the official liquidator, in support of the Commissioner's order.

They contended that the purchase from *Butcher*, under all the circumstances of the case, was invalid, and that the payment of attendance fees was illegal. And with reference to the shares in category (c), they contended that the circumstances of the case precluded any

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AND MIDLAND
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such right of set-off as had been contended for on the other side.

Mr. *Daniel* in reply.

The only equity (if any) which the company can have in respect of the purchase from *Butcher* must be sought by a bill framed with the view of having the purchase set aside, and the shares paid as part of the consideration thereof delivered up. The attendance fees were voted by resolution of the Appellants as directors.

Judgment reserved.

Nov. 13.

*The* LORD JUSTICE TURNER.

This case has been so recently argued that it is unnecessary to recapitulate the facts.

There are three points to be considered: 1st. As to the 100 shares. 2ndly. As to the shares taken for attendance fees; and 3rdly. As to the shares for which the memorandum of association was signed.

As to the 100 shares, subject to any further argument which the official liquidator may desire to bring forward on the point to which I shall advert, I am of opinion that the Appellants are not liable to contribute in respect of those shares. Contribution is to be made according to the liabilities of the parties at law or in equity. These shares were allotted to *Butcher* under the authority given by the articles as paid-up shares in part of the consideration of the purchase made by the directors from him. That purchase was either valid or invalid. If valid it is clear that neither he nor his alienees can be called upon to contribute in respect of  
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these shares. If invalid, I cannot see my way to hold that either a Court of law or a Court of equity could do more than treat the purchase as void, and undo the transaction altogether. It could not, as I apprehend, be competent either to a Court of law or to a Court of equity to alter the terms of the purchase, and treat as shares not paid up shares which were given as paid-up shares in part consideration of the purchase. Fraud, assuming there was fraud, would of course warrant the Court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorize any Court to substitute other terms.

As to the shares taken for attendance fees, I am also of opinion that the Appellants are not liable to contribute in respect of those shares. They were taken, and, as it seems to me, improperly taken, as paid-up shares, but the same principles which apply to the 100 shares apply, as I think, to these shares also. The transaction might be undone but could not be modelled. It was argued for the Appellants, that these shares ought to be taken in part of the shares for which the memorandum of association was subscribed. But it is evident that to permit this would be to sanction a mere evasion.

As to the twenty-one shares for which the memorandum of association was subscribed, the Appellants are of course liable to contribute, subject as to Captain *Currie* to his discharge in consequence of his having parted with some of his shares, which discharge is absolute as to some of the shares parted with beyond the year, contingent as to those parted with within the year.

The case is thus disposed of so far as it was argued before us, but, on looking through these papers, I have found that at a meeting held on the 10th *August*, 1860,  
at

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GREAT  
NORTHERN  
AND MIDLAND  
COAL CO.  
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CASE.



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at which these parties were present, the following resolution was passed. It is thus, so far as it is material, stated on the minutes: "Present—Mr. *Longcluse*, Mr. *Parker*, Captain *Currie*, Mr. *Fitzpatrick*, Mr. *Hacker*, Mr. *Pattison*, Mr. *Rochussen* and Mr. *Butcher*—Resolved, that a company be incorporated to carry out the undertaking as detailed in the prospectus. Each of the gentlemen present agreed to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and to act as directors to the company. (Signed) *M. J. Currie*." Nothing was, I think, said in the course of the argument as to the effect of this resolution, and it may admit of argument whether this resolution ought not to affect our decision as to the 100 shares, either upon the ground that those shares, though nominally taken as paid-up shares, ought to be held to have been taken by way of qualification, and therefore ought to be held to be unpaid shares, or upon the ground that the above resolution distinguishes this case from that of Lord *Abercorn* (*a*), and that the Appellants, notwithstanding that case, are liable in respect of these shares. Upon these points we think that, if it be desired on the part of the official liquidator, further argument ought to be admitted.

*The* LORD JUSTICE KNIGHT BRUCE concurred, and the case accordingly stood over for further argument upon the point suggested by the Lord Justice *Turner* in his judgment.

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Nov. 22. On this day it was further argued accordingly by the same counsel as before for the same parties, and an order

(a) *In Re The National Insurance and Investment Association*, 4 De G., F. & J. 78.

order was made whereby in effect their Lordships retained the Appellants on the list of contributories as to the twenty-one shares, and struck them off the list as to the paid-up shares accepted by them for fees. And they referred it back to the Commissioner, without prejudice to any question, to inquire and determine whether or not the said Appellants as being subscribers for twenty-one shares each to the memorandum, and also being subscribers of the articles of association of the said company, or any or each of them, should be placed on the list of contributories of the said company, and be ordered to pay on 100 shares each (inclusive of the said twenty-one shares subscribed for by them respectively) for their qualification as directors of the said company. The order also reserved the consideration of the costs of the original application, and gave the parties liberty to apply.

On the reference directed by this order, the Commissioner decided that the Appellants were liable to be placed on the list and ordered to pay on 100 shares each as above mentioned.

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From this decision the Appellants presented a further appeal.

The grounds, in addition to those mentioned above, upon which the Commissioner arrived at his decision, as also the arguments of counsel upon the present appeal, sufficiently appear from the judgment of the Lord Justice *Turner*.

The same counsel appeared for the same parties as before, and at the close of their argument their Lordships reserved their judgments.

1862.

*In re*  
GREAT  
NORTHERN  
AND MIDLAND  
COAL CO.  
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CASE.

1863.

*April 24.*  
*May 1.*

*The*

1862.  
IN re  
GREAT  
NORTHERN  
AND MIDLAND  
COAL CO.  
CURRIE'S  
CASE.

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from an order of Mr. Commissioner  
which order the Appellants respectively  
put on the list of contributories of the com-  
pany. They were also originally on the list for twenty-one  
shares in addition to twenty-one  
which they were previously on the list.

The Appellants were originally on the list for twenty-one shares for which they had subscribed the memorandum of association of the company. They were also originally on the list for certain paid-up shares which they had accepted for fees payable to them as directors of the company. They were also originally on the list for 100 paid-up shares which had been transferred to them by a gentleman of the name of *Butcher*, the originator of the company, and which had been given to *Butcher* in part payment of the purchase-money for property which the company had purchased from him; and they were further on the list for 100 other shares for their qualification as directors of the company.

The learned Commissioner afterwards struck the Appellants off the list as to the 100 qualification shares on the authority of *Lord Abercorn's Case* (a), and the case having subsequently come before us as to the other shares, we made an order by which in effect we retained the Appellants on the list as to the twenty-one shares, struck them off from the list as to the paid-up shares accepted by them for fees, and referred it back to the learned Commissioner without prejudice to any question to inquire and determine whether or not the said Appellants, as being subscribers for twenty-one shares each to the memorandum,

(a) *In re The National Insurance and Investment Association*, 4 De G., F. & J. 78.

Memorandum, and being also subscribers of the articles of association of the said company, or any or each of them, should be placed on the list of contributories of the said company, and be ordered to pay on 100 shares each (inclusive of the said twenty-one shares subscribed for by them respectively) for their qualification as directors of the said company; and we also reserved the consideration of the costs of and occasioned by the original application and gave the parties liberty to apply.

It is under this order that the learned Commissioner has put the Appellants upon the list for the seventy-nine shares which are now in question, making, with the twenty-one shares, the 100 shares for their qualification as directors, and it is the learned Commissioner's decision upon this point which is brought under review by the present appeal.

The circumstances under which the learned Commissioner arrived at this decision are these:—

At a meeting of the promoters of this company, held on the 8th of *August*, 1860, it was resolved that the company should be formed. At another meeting, held on the 10th of *August*, 1860, at which all the Appellants were present, the following resolution was passed, after referring to the preliminary matters:—"Resolved, that a company be incorporated to carry out the undertaking as detailed in the prospectus, and that Mr. *Butcher* be the manager of the company;" and then the solicitor and the secretary are appointed, and they come under certain resolutions; and then this resolution was passed:—"Each of the gentlemen present agreed to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and act as directors to the company." That resolution was passed on the 10th of *August*, 1860.

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GREAT  
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CASE.

On

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GREAT  
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AND MIDLAND  
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CASE.

On the 25th of *August*, 1860, the memorandum of association of the company was signed by the Appellants respectively, and by this memorandum of association they signed for twenty-one shares, stating the objects for which the company was formed with a nominal capital of 50,000*l.*, and "we, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names." Then there are twenty-one shares set opposite to the names of each of these gentlemen.

On the same 25th of *August*, 1860, the company's articles of association were also signed by the Appellants respectively.

By these articles of association it was agreed amongst other things, that "no person shall be deemed to have accepted any share in the company unless he has testified his acceptance thereof by writing under his hand in such form as the company from time to time directs."

Article 60 is in these terms—"The number of directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association, but so that there shall be not less than three nor more than nine."

The 61st is—"Until the directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of this act, be deemed to be directors."

The 62nd is—"That no shareholder shall be entitled to be a director unless he holds at least 100 shares in the company."

The

The 72nd clause of the deed, which was also referred to in the course of the argument, was, that "the directors appointed by the subscribers to the memorandum of association and these articles remain as directors of this company for the term of three years."

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In re  
GREAT  
NORTHERN  
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CASE.

These are the circumstances under which the learned Commissioner has put these gentlemen on the list, and the question is whether, under these circumstances, they ought to be put upon the list of contributories and be ordered to pay on 100 shares each (including the twenty-one shares for which they signed the memorandum of association) for their qualification as directors.

It was not contended on the part of the Appellants, that if they were under an obligation to take 100 shares as directors, the obligation could be satisfied by their having taken these unpaid shares; nor could it have been so contended with any prospect of success, for it would be a mere delusion to hold that the obligation could be satisfied without any liability being incurred. Nor was it contended on the part of the Appellants that this case could be governed by *Lord Abercorn's Case*; and it is plain it could not be so governed, the cases being in every respect distinguishable.

But it was insisted on the part of the Appellants that they were under no liability to take 100 shares in the company; that the agreement contained in the resolution of the 10th of *August*, 1860, was a mere agreement between the parties, and not an agreement by them with the company, which in truth at that time had no existence; that that agreement was superseded, so far as it could have any effect, by the memorandum of association, by which the Appellants took twenty-one shares only, and that under the articles of association the  
Appellants

1863.  
IN RE  
GREAT  
NORTHERN  
AND MIDLAND  
COAL CO.  
CURRIE'S  
CASE.

Appellants were under no liability to take the 100 shares. It was insisted, that under the 61st clause of these articles, the Appellants, as subscribers to the memorandum of association, were appointed directors until directors should be appointed by the shareholders; then that, no appointment having been made by the shareholders, the Appellants continued directors on the footing of the memorandum of association, and that they were in no way affected by the 62nd clause of the articles; that that clause did not reach the Appellants at all, but applied only to shareholders; and the Appellants held their office of directors, under the 61st clause, as being subscribers to the memorandum of association.

I am not of opinion that the argument can be at all maintained, that these gentlemen are not affected by the 62nd clause of the articles of association. I think that by the 60th clause of those articles it became the duty of these Appellants themselves to appoint directors, and that the 62nd clause was meant to extend and would extend to directors so appointed; and it having been the duty of these Appellants so to appoint, and default having been made by them in so appointing, I am of opinion that they were chargeable in equity as if they had so appointed, and in effect that they must be considered in equity to have appointed themselves and to be chargeable accordingly.

The 72nd clause of the articles was relied on on the part of the Appellants. But I think that, so far from assisting the Appellants' case, that clause favours the view which I have taken of the articles; for it refers to directors appointed by the subscribers and the articles, and shows therefore that it was the duty of the Appellants to make the appointment.

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On these grounds therefore I concur with the opinion of the learned commissioner.

As to the costs which were reserved and the costs of the present Appellants, I am of opinion that the Appellants should pay all the costs from the date of the order of reference, but that no costs should be given up to that time, the Appellants in truth having in part succeeded in the previous contest.

1863.  
In re  
GREAT  
NORTHERN  
AND MIDLAND  
COAL CO.  
CURRIE'S  
CASE.

*The* LORD JUSTICE KNIGHT BRUCE.

I think it unnecessary to give any opinion in this case independently of the proceedings of the 8th and 10th of *August*, 1860. Taking those proceedings and the articles of association together, I agree with the learned Commissioner, and I also concur with my learned Brother's conclusion as to the costs.

Ordered accordingly, the official liquidator taking his costs out of the estate, and,

Upon the application of Mr. *Roxburgh* on his behalf on this day, the deposit as part of his costs. *May 22.*





1862.

Ex parte JOHN COLE and JAMES THOMAS  
ATTWATER.

In the Matter of JOHN WILLIAM ATTWATER,  
a Bankrupt.

Dec. 2.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

Where upon  
the application  
of the solicitor  
for the as-  
signees, the  
Court below  
made an order  
which it had  
no jurisdiction  
to make, the  
Court of ap-  
peal ordered  
the assignees  
personally to  
pay the costs.

THIS was an appeal from an order of Mr. *Espinasse*, the County Court Judge sitting in bankruptcy at *Sheerness*, in *Kent*, which was expressed in the following terms :—

“Upon the application of the solicitor for the assignees, and upon hearing the evidence of *James Thomas Attwater* and others, and the statement of the said solicitor that the bankrupt did, by indenture dated the 25th day of *June*, 1862 (which the said *James Thomas Attwater* produced and submitted to the Court), convey four houses and other property situate in the parish of *Minster*, in the *Isle of Sheppey*, in the county of *Kent*, to the said *James Thomas Attwater*, when he (the said bankrupt) was known to be insolvent, and without valuable consideration, it is ordered that the said houses and other property comprised in the said indenture be given up to the assignees, and taken possession of by them, and be sold and disposed of for the benefit of the creditors under the bankruptcy: And it is further ordered that the said indenture, dated the 25th day of *June*, 1862, be retained by the registrar, and be disposed of as the Court shall direct.”

This order was made on the attendance of the Appellant *John Cole* (who held the indenture referred to in it on behalf of the other Appellant) and *James Thomas Attwater*, in obedience to a summons issued under the  
Bankrupt

Bankrupt Law Consolidation Act, 1849, s. 120. There was nothing to show that either of the Appellants had submitted to the jurisdiction of the Court.

1862.

Ex parte

COLL.

In re

ATTWATER.

Mr. *Daniel* and Mr. *Clement Swanston* appeared for the Appellants.

Mr. *Fooks* for the assignees.

*The* LORD CHANCELLOR discharged the order under appeal, remarking that it was quite beyond the power of the Court to make such an order; and his Lordship ordered the indenture to be delivered up to the Appellants without prejudice to any question as to its validity. With regard to the costs of the appeal, his Lordship directed the assignees to pay them, and declined to allow them their costs out of the estate, the order under appeal having been made on the application of the assignees.



1862.

Ex parte WILLIAM STILL and GEORGE STRICK-  
LAND STILL.

In the Matter of WILLIAM STILL and GEORGE  
STRICKLAND STILL, Bankrupts.

Dec. 3.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

Mere sus-  
picion of the  
commission of  
one of the  
offences de-  
scribed in the  
Bankruptcy  
Act, 1861,  
s. 221, is not  
sufficient to  
warrant a di-  
rection for the  
prosecution of  
a bankrupt for  
misdemeanor.

THIS was an appeal of the bankrupts against two orders of Mr. Commissioner *Goulburn*, by the first of which he directed the indictment of the bankrupts under the Bankruptcy Act, 1861, s. 221, rules 2 and 5(a); and by the second of which he postponed their final examination sine die.

The bankrupts were a father and son, partners in business.

(a) The section and rules in question are as follows:—

“221. From and after the commencement of this act, any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors shall be guilty of a misdemeanor, and shall be liable, at the discretion of the Court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute.”

“2. If he shall not upon his examination fully and truly discover, to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom and for what considera-

tion, and when he disposed of, assigned or transferred any part thereof, except such part as has been really and bona fide before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family, or shall not deliver up to the Court, or dispose as the Court directs of all such part thereof as is in his possession, custody or power, except the necessary wearing apparel of himself, his wife and children; and deliver up to the Court all books, papers and writings in his possession, custody or power relating to his property or affairs.”

“5. If he shall, with intent to defraud, wilfully and fraudulently omit from his schedule any effects or property whatsoever.”

business. They borrowed a sum of 800*l.* from a banking company, giving as security for its repayment the guarantee of a Mr. *Benthams*. To secure him in respect of his liability upon this guarantee, they executed to him on the 17th of *January*, 1862, a bill of sale of all their property, including their plant and stock-in-trade. The particulars of the property comprised in the bill of sale were given in a schedule thereto, together with their estimated values, which amounted in the aggregate, so far as the plant and stock-in-trade went, to 3,046*l.*

1862.  
Ex parte  
STILL.  
In re  
STILL.

In the month of *April*, 1862, Mr. *Benthams* entered into possession of, and on the 5th of *May*, 1862, purporting to act in pursuance of a power contained in the bill of sale, sold for 900*l.* the property therein comprised to *Joseph Still*, a brother of the elder bankrupt; and *Joseph Still* thereupon placed in possession as his agent a boy named *Thomas Still*, a son of the elder bankrupt.

The debt due from the bankrupts to the banking company was paid off out of the consideration money received by *Benthams*.

On the 17th of *May* the bankrupts were adjudged bankrupts on their own petition.

In their first accounts under the bankruptcy they showed indebtedness to a large amount and no assets. They estimated the value of their plant and stock-in-trade on the 1st of *January*, 1862, at 3,046*l.*, a valuation corresponding with that contained in the bill of sale to *Benthams*. On the balance of subsequent sales and purchases they showed a reduction of value to the extent of 1,110*l.* 15*s.* 4*d.*, leaving a difference of 1,935*l.* 4*s.* 8*d.* to be accounted for; whilst it was alleged that the property taken by *Joseph Still* would scarcely produce on realization the 900*l.* for which it was sold.

1862.

Ex parte  
STILL.In re  
STILL.

It was upon these materials that the Commissioner made the first of the orders under appeal.

Further accounts were subsequently furnished by the bankrupts wherein they reduced their estimate of the value of their stock-in-trade, exclusive of their plant, on the 1st of *January*, 1862, to 1,926*l*. Mr. *Hart*, an accountant, appointed by the Court under the Bankruptcy Act, 1861, s. 143, to assist the bankrupts in making out the accounts, estimated it at 1,983*l*., but he arrived at this amount by comparing the amounts of sales and purchases as shown by the bankrupts' books, and by the assumption that 20*l*. per cent. of the produce of sales represented profits,—this assumption swelling his estimate by a sum of 1,021*l*., which, if deducted, would reduce his estimate to 962*l*. Mr. *Hart*, however, as the result of his investigation, reported that the state of the accounts could only be explained in one of two ways, viz., that either the value of the bankrupts' stock-in-trade was greatly over-estimated in *January*, 1862, or that the bankrupts must have connived at the abstraction of a very large amount of their property; and he recommended further inquiries.

Mr. *E. K. Karlake* and Mr. *Robertson Griffiths*, for the Appellants, having opened their case,

The LORD CHANCELLOR called upon the counsel for the assignee to support the Commissioner's order.

Mr. *Bacon* and Mr. *Little* for the assignee.

They contended that the case was one of the gravest suspicion, and one which warranted the Commissioner in making the order for indictment. With that order so made the Court of appeal would be slow to interfere.

*Benthams*

*Benthams* had paid no money upon the occasion of the giving of the bill of sale, which was in fact a deed of hidden trust for the bankrupts; so that the property therein comprised must be looked upon as property of the bankrupts, and should have been returned by them in their accounts on that footing. For not having done so, they were liable to indictments under the 221st section of the act. The 222nd section showed that a *prima facie* case only was necessary to be made out to warrant an order of the Court for an indictment under sect. 221.

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Ex parte  
STILL.  
In re  
STILL.

A reply was not heard.

*The LORD CHANCELLOR.*

This is a case the determination of which is no doubt attended with anxiety. It presents elements from which a conclusion of fraudulent conduct against the bankrupts might *prima facie* be reasonably entertained. The position however in which the question before me stands is, as if, pending a civil suit to set aside the deed of sale to *Joseph Still* as fraudulent, and whilst the matter of the civil right was still sub judice and undetermined, the Court were to direct a criminal prosecution.

To do this is to incur great responsibility, especially where the expense of the prosecution, if directed, will fall on the public. Whilst therefore on the one hand it is the duty of the Court to give effect to the spirit of the bankrupt law for the suppression of fraudulent practices, it is equally incumbent on the Court, on the other hand, to proceed in the matter of directing prosecutions upon something more than mere suspicion.

The present is, as I have said, a case warranting grave suspicions of fraud, yet the investigations into

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which

1862.  
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Ex parte
STILL.
In re
STILL.

which have been unduly abridged. [His Lordship then went into the facts of the case prior to the intervention of Mr. *Hart*, remarking that the nature of the purpose for which *Joseph Still* was brought upon the scene had not been accurately shown, but that, *ex evidentiâ rei*, he came forward as a friend of the bankrupts and for their benefit. His Lordship then proceeded thus:]

But, then, a difficulty arises. A Mr. *Hart*, an accountant, is employed, and his investigations, which, except in one particular, appear to have been accurately conducted, and which there is nothing to discredit, throw doubts upon the accuracy of the estimate appended to the bill of sale. Mr. *Hart's* statement amounts to this: that the whole account appended to the bill of sale, as also the accounts filed in bankruptcy, are erroneous, and that there was no such property as that represented to be of the value of 3,046*l.*

Again, Mr. *Hart* debits the bankrupts with 1,021*l.*, which he says represents profits—that is to say, he considers that the difference between the cost price and the amount at which the goods were sold ought to be considered as so much additional stock.

But that is mere conjecture: he thinks it probable that the bankrupts would get 20*l.* per cent. profit out of their sale. I cannot act upon that as a foundation for a criminal prosecution.

Then, throwing out this item, the 3,046*l.* is reduced to such an amount as that, if the property handed over from *Benthams* to *Joseph Still* had been worth 1,000*l.* or 1,100*l.*, the whole of the bankrupts' property would have been accounted for.

The

The question, therefore, is narrowed to this, whether the transaction between *Benthams* and *Joseph Still* was bonâ fide or collusive and fraudulent. If the latter, the fact of notice on the part of the bankrupts of the fraud would at least require to be established before they could be brought within the rigour of the Bankruptcy Act, 1861, s. 221, on the ground of the arrangement being a contrivance with the intent to defraud or defeat the rights of their creditors. If I were now in the position of hearing a suit in equity to set aside the sale to *Joseph Still* as fraudulent, and for a declaration that *Benthams* had a lien only, and that the bankrupts ought to have accounted for the residue, I should direct further inquiries. This being the state of the evidence, I shall not discharge the order for indictment because I think doubts may be entertained whether this was not a mere fraudulent sale. I suspend the order for the purpose of having the deficiency of evidence in that respect made good, and of affording an opportunity of still further examining the bankrupts, and I discharge the order, postponing their final examination sine die. Let the appeal stand over till further order, and the assignee will have the right and will be under the obligation of prosecuting inquiries in order to arrive at a certain conclusion. If it should appear that the conclusion as to fraud is supported, I shall discharge the suspension, and direct these bankrupts to be taken into a criminal Court.

1862.

Ex parte
STILL.
In re
STILL.

The order on the appeal was, that the order directing the prosecution should be suspended till further order of the Court of Appeal; that the adjournment sine die should be discharged; that the assignee should forthwith prosecute inquiries as to the dealings with the property included in the conveyance to *Still*, and that all the other

1862.

Ex parte
STILL.In re
STILL.

1863.

May 1.

other matters of the appeal should stand over, with liberty to apply.

On this day the matter was mentioned again, and the sanction of the Lord Chancellor given to a compromise arrived at by the parties before the Commissioner.

Ex parte J. G. CHURCHILL.

In the Matter of SAMUEL GRIFFITHS, a
Bankrupt.

1862.

Dec. 5.

Before The
Chancellor
LORD

WESTBURY.

The costs of an official assignee who appears by counsel on the hearing of an appeal merely to consent to the reversal of the order ought not to be allowed out of the estate.

And in the Matter of SAMUEL GRIFFITHS and
E. B. THORNEYCROFT, Bankrupts.

THIS was an appeal from an order of the Registrar of the Court of Bankruptcy for the *Birmingham* district directing that a separate petition for adjudication against one of the bankrupts should be impounded and all proceedings under it stayed.

Mr. *Bacon* and Mr. *De Gex* appeared for the Appellant Mr. *Churchill*, who was the petitioning creditor for the separate adjudication.

Mr. *Clement Swanston* appeared for the bankrupts in support of the order under appeal.

Mr. *E. K. Karslake* for creditors, and Mr. *Eyre Lloyd* for the official assignee, appeared to consent to the discharge of the order.

The

The LORD CHANCELLOR discharged the order under appeal, with liberty to the parties, or any of them, to apply to the Court of Bankruptcy with reference to the consolidation of the proceedings or any part thereof under the petitions for adjudication, and said that where the official assignee's only duty in the matter was to give his assent to the reversal of an order, no costs of his appearance could be allowed to him out of the estate.

1862.
Ex parte
CHURCHILL.
In re
GRIFFITHS.

Ex parte SOLOMON WOLLHEIM.

In the Matter of SOLOMON WOLLHEIM, a
Bankrupt.

THIS was an appeal by the bankrupt from the refusal of Mr. Commissioner *Goulburn* to annul the adjudication.

When the appeal came on to be heard their Lordships made an order in the usual form (*a*), directing the appeal to stand over, with liberty to the Appellant to bring an action against the petitioning creditors for the seizure of the bankrupt's goods, in order to test the validity of the adjudication.

(*n*) See *Ex parte Watson*, 5 De G., M. & G. 396; S. C., De G., M. & G. Bcy. App. 436.

trade was wholly in *Scotland*, was directed to stand over, with liberty to the bankrupt to bring an action to try the validity of the adjudication. On the failure of the petitioning creditors to appear to the action within a time limited by the Court for the purpose, the Court annulled the adjudication.

Pending the proceedings the goods of the Appellant seized by the messenger had been sold by arrangement:—*Held*, that the official assignee was entitled to deduct from monies received by him from the sale monies expended in warehousing and selling the goods, but not his costs of proceedings in Court; the Court directing that these should be paid by the petitioning creditors, who, like the official assignee, were Respondents to the petition, and ordering that the petitioning creditors should pay to the bankrupt the monies to be deducted by the official assignee.

Aug. 5.
Nov. 14.
Dec. 6.
Before The
LORDS JUSTICES.
An appeal
by the bank-
rupt from a
refusal of a
Commissioner
to annul an
adjudication
of bankruptcy
obtained in
England by
residents in
Scotland, as
petitioning
creditors,
against a
trader whose

1862.

Ex parte
WOLLHEIM.In re
WOLLHEIM.

In pursuance of this liberty the Appellant brought an action against the petitioning creditors.

To this action, notwithstanding service upon them, the petitioning creditors entered no appearance.

The facts of the case, so far as they are material to the present report and as they appeared on the affidavits, were these:—

The Appellant was resident and carried on business in *Scotland* only. His creditors for the most part, the petitioning creditors amongst the number, also resided in *Scotland*.

The adjudication was obtained in *England*. An official assignee was appointed, who took possession of goods belonging to the Appellant and warehoused them at some expense, until, by arrangement and under an order of the Commissioner, they were sold. Of the proceeds of this sale, some portions had been advanced to the Appellant in order to enable him to meet expenses connected with the proceedings in bankruptcy, and the remainder was still in the hands of the official assignee.

Under these circumstances,

Nov. 14. Mr. *De Gex*, on behalf of the Appellant, applied for the annulling order sought by the appeal. He contended that the petitioning creditor had no right to take and reject English procedure at his pleasure, to resort to the English jurisdiction in bankruptcy, and decline the same jurisdiction at law, when the object of the legal proceedings was to test the validity of those in bankruptcy, and that,

that, on the merits of the case, such an adjudication as that here in question could not be supported, *Scotland* being, as for all the purposes of the case, it was necessary to regard it, a foreign country.

1862.

 Ex parte
 WOLLHEIM.
 In re
 WOLLHEIM.

Mr. *Reed*, for the petitioning creditors, contended that, under the circumstances of the case, the action, if brought at all, ought to have been brought in *Scotland*.

Mr. *Bagley* for the official assignee.

Their LORDSHIPS ordered that the adjudication should be annulled unless within ten days from the date of the order the petitioning creditors should appear to the action, and their Lordships gave general liberty to apply as to costs or otherwise. The monies in the hands of the official assignee were ordered to remain there until further order, and the matter was to be mentioned again.

No appearance having been put in to the action by the petitioning creditors within the ten days' grace accorded by the order of the Court,

Mr. *De Gez*, on behalf of the Appellant, on this day, under the general liberty to apply reserved by the former order, applied for a return of the deposit and also for the payment to the Appellant by the official assignee of the full proceeds of the sale of the Appellant's goods, and for payment of the Appellant's costs by the petitioning creditors.

Dec. 6.

Mr. *Bagley* appeared for the official assignee.

The petitioning creditors did not appear.

Their

1862.
 ~~~~~  
 Ex parte  
 WOLLHEIM.  
 In re  
 WOLLHEIM.

*Their* LORDSHIPS made their previous conditional order for annulling the adjudication absolute.

A question then arose with reference to the costs of the official assignee.

On the part of the Appellant, it was contended, that the bankruptcy having been annulled, any claim which the official assignee had to make in respect of costs must be made against the petitioning creditors, and that no part of such costs could be paid out of the property of the Appellant. And *In re Scott Russell* (a), as a decision in point in bankruptcy, and *In re Windham* (b), and *Ex parte Harding* (c), as analogous authorities in lunacy and under the Joint Stock Companies Act, 1856, respectively, were referred to.

On the part of the official assignee, it was contended, that his position differed from that of Mr. *Harding* in *Ex parte Harding* in two respects—first, in that as the officer of the Court he could not have declined to deal with the Appellant's goods; and, secondly, that he was not a stranger to the proceedings, nor was there here any absence of a fund in Court out of which his costs might be paid. That the Appellant, by sanctioning the sale which had been made, had precluded himself from objecting to the allowance of the expenses incidental to it; that it would be irregular, as well as probably in the present case, regard being had to the abode of the petitioning creditors, nugatory to order the petitioning creditors, as Respondents, to pay the costs of the official assignee, who was another Respondent (d); and that

(a) 31 L. J. (N. S.), Bcy. 37, 47.

(b) 4 De G., F. & J. 53.

(c) 32 L. J. (N. S.) Ch. 145.

(d) See however the *Bankruptcy Act*, 1861, s. 213.

that the proper order would be, as in Chancery, to make the Appellant pay them, and have them over against the petitioning creditors.

1862.  
  
 Ex parte  
 WOLLHEIM.  
 In re  
 WOLLHEIM.

*Their* LORDSHIPS made an order to the following effect:—

Annul the adjudication. Let the petitioning creditors pay the costs of the Appellant and of the official assignee of the proceedings in the Court of Bankruptcy and in the Court of Appeal. Let the official assignee be debited with the proceeds of the sale and have credit for all sums paid by him to or on account of the Appellant and for all payments properly made in respect of the custody and sale of the goods, and let him pay over any surplus to the Appellant. Let the petitioning creditors pay to the Appellant the amount for which the official assignee shall have credit in respect of the last-mentioned payments. The order to be without prejudice to any proceedings which may be taken against the petitioning creditors in *Scotland*.



1862.

## Ex parte ROBERT WATTS.

In the Matter of JOHN WILLIAM ATTWATER,  
a Bankrupt.

Dec. 12.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

Assignees in  
bankruptcy  
may in a  
proper case  
be ordered to  
pay costs per-  
sonally, and  
not be allowed  
them out of  
the bankrupt's  
estate, not-  
withstanding  
they act  
pursuant to a  
resolution of  
creditors.

THIS was an appeal of *Robert Watts* from an order of Mr. *Espinasse*, the County Court Judge sitting in bankruptcy at *Sheerness*, by which he directed a barge, as being in the bankrupt's reputed ownership, to be delivered up to the assignees by the Appellant, who claimed a charge upon it under an agreement. The Lord Chancellor, upon the election of the assignees not to redeem the barge, reversed the decision below. The only point on which the case deserves a report is the question of costs.

Mr. *Bacon* and Mr. *Martindale* appeared for the Appellant.

Mr. *Fooks* (Mr. *Baggallay* with him), for the assignees, stated that the question was raised in the Court below by the assignees in accordance with a resolution of creditors.

The LORD CHANCELLOR said that the creditors who passed that resolution must indemnify the assignees against their costs incurred in giving effect to it. His Lordship said he should not make the assignees pay the costs of the appeal; but he should direct that the assignees should pay the costs of the application to the Court below personally, and should not be allowed them out of the estate.

1862.

Ex parte HENRY MILLER.

In the Matter of HENRY MILLER, a Bankrupt.

Nov. 19.  
Dec. 19.

Before The  
LORDS JUSTICES.

THIS was a motion on behalf of the bankrupt, who had been so adjudged by the *Liverpool* District Court of Bankruptcy, seeking to have the adjudication annulled for want of a good petitioning creditor's debt or act of bankruptcy, or, in the alternative, for liberty to show cause before the district Court against the adjudication.

An application to annul an adjudication of bankruptcy made by a bankrupt, whether before or after the time has elapsed for showing cause against the adjudication, under the Bankrupt Law Consolidation Act, 1849 (12 & 13 *Vict.* c. 106), s. 104, is an appeal from the order of adjudication, and is properly made by way of motion to the Court of Appeal at any time within the limit of two months specified in the 233rd section of the act, as amended by the Bankruptcy Act,

The date of the adjudication was the 9th of *September*, 1862, that of the advertisement the 23rd of the same month, that of the notice of the present motion the 7th of *November*, 1862, that of its service the 8th of *November*, and such service was made upon the petitioning creditors, whose solicitors also accepted it on behalf of the official assignee.

In support of the motion and of an application made together with it on behalf of the bankrupt for leave to add to the evidence, an affidavit of the bankrupt was filed, wherein he stated that he had gone to *Italy* on business in *April*, 1862, and returned to *England* in *August*; that he was not aware of any proceedings in bankruptcy having been taken against him until the

25th

1854 (17 & 18 *Vict.* c. 119), s. 24.

Circumstances under which the Court of Appeal allows new evidence to be adduced.



1862.

Ex parte  
MILLER.  
In re  
MILLER.

25th of *September*, when he accidentally became aware of the fact by reading a list of bankrupts in the *Daily Telegraph* newspaper; that shortly afterwards notice was given on his behalf of an application to be made to the Commissioner to annul the adjudication on the ground of surprise; but that the Registrar refused to receive affidavits which were on the 23rd of *October* tendered in support of the application, on two grounds, 1st, that an application to annul could only be made on the ground of the want of some or one of the legal requisites; 2ndly, that the application must be not to the Commissioner, but to the Court of Appeal.

Nov. 19.

Mr. *De Gez*, for the bankrupt, in support of the application for leave to adduce further evidence, referred to *General Orders in Bankruptcy*, 6 *November*, 1861, *Order 32 (a)*, and submitted that this was a proper case for the admission of further evidence, the bankrupt having

(a) The General Order in question and the sections of the acts of Parliament referred to in the argument and in the judgment of the Lord Justice Knight *Bruce*, are respectively, so far as they are respectively material, as follows:—

General Orders in Bankruptcy, 6 *November*, 1861.—Order 32. “All appeals to the Court of Appeal shall be brought on by motion, and no new evidence shall be received on any appeal

unless the Court of Appeal shall, on the hearing thereof, so direct.”

Bankrupt Law Consolidation Act. 1849, s. 12.—“That the Court, in the exercise of its primary jurisdiction by virtue of this act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the

having had no opportunity of meeting the case alleged against him by the petition.

Mr.

1862.

Ex parte  
MILLER.

In re  
MILLER

bankrupt, or of any estate or effects taken under the bankruptcy, and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees in virtue or under colour of the bankruptcy, and also in any matter of bankruptcy whatever as between the assignee and any creditor or other person appearing and submitting to the jurisdiction of the Court; and also in any application for a certificate of conformity, and in any other matter (whether in bankruptcy or not), where the Court by virtue of this act has jurisdiction over the subject of the petition or application, save and except as may be by this act otherwise specially provided, and subject in all cases to an appeal to such one of the Vice-Chancellors of the High Court of Chancery as the Lord Chancellor shall from time to time be pleased to appoint to sit in bankruptcy; provided always, that if no such appeal shall be entered within twenty-one days from the date of any decision or order of the Court, and be thereafter duly prosecuted, every such decision or order shall be final; and that every appeal shall be subject to such regulation in regard to deposit of costs as shall, by any general rule or order to be made in pursuance of this act, be directed."

The appeal is, by the 14 & 15 *Vict.* c. 83, s. 7, directed to be presented to the Lords Justices.

Bankrupt Law Consolidation Act, 1849, s. 104.—"That, before notice of any adjudication of bankruptcy shall be given in the *London Gazette*, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person; and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the Court shall think fit, from the service of such duplicate, to show cause to the Court against the validity of such adjudication," &c.

Ib. s. 233.—"That if a bankrupt shall not (if he were in the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of Europe at the date of the adjudication), within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit or other proceeding to dispute or

18C2.

Ex parte  
MILLER.  
In re  
MILLER.

Mr. *Clement Swanston*, for the petitioning creditors, objected that this Court could not entertain the matter at all. It was either an original motion which the Court would not hear; or, if an appeal, was out of time. He referred in support of his objection to *The Bankrupt Law Consolidation Act, 1849, s. 12*; and *Ex parte Stubbs (a)*.

*Their LORDSHIPS* said that they would dispose of the objection at the same time with the application on the merits, and directed the case to stand over till the first bankruptcy day after term, with liberty to either side to adduce further evidence as they might be advised.

The

annul the fiat or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt; and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date of filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed on the day on which the

same is stated in the *Gazette* to bear date."

The Bankruptcy Act, 1854, s. 24.—"The section of The Bankrupt Law Consolidation Act, 1849, numbered ccxxiii, limiting the time within which a person adjudged bankrupt may dispute the adjudication, shall, in the case of every person who shall be adjudged bankrupt on or after the first day of *September*, one thousand eight hundred and fifty-four, be construed and acted upon for all purposes whatsoever as if the words 'two calendar months' were therein inserted, in lieu of the words 'twenty-one days.'"

(a) *Mont. & Chitty, 511.*

The application was renewed accordingly on this day upon the old and also upon new evidence, but it is not necessary here to enter into the merits of the case.

1862.

Ex parte  
MILLER.

In re  
MILLER.

Dec. 19.

Mr. *Daniel* and Mr. *De Gex*, in support of the motion, and with reference to the preliminary objection, contended that the present application was in time, the adjudication having been made on the 9th of *September*, and notice of the present application served on the 8th of *November*; *The Bankrupt Law Consolidation Act*, 1849, s. 233, as amended by *The Bankruptcy Act*, 1854, s. 24. They also insisted that the Court of Appeal was the proper Court; *Carter v. Dimmock* (a).

Mr. *Bacon* and Mr. *Clement Swanston* for the petitioning creditors.

The application is out of time, if it is an appeal; *The Bankrupt Law Consolidation Act*, s. 12. Section 233 does not touch the question. Speaking, as it does, of the bankrupt having within a limited time "*commenced* an action, suit, or other proceeding to dispute or annul the fiat or the petition for adjudication," it must be held to apply only to the commencement of other proceedings ejusdem generis, as actions or suits. But the jurisdiction of this Court is appellate and not original, and no such proceeding can consequently be commenced in it. The course which should have been adopted by the bankrupt is that pointed out by the Bankrupt Law Consolidation Act, 1849, s. 104, viz., a recourse to the Commissioner in the first instance; or,  
failing

(a) 1 *De G.*, *M. & Gor.* 212; 4 *H. of L. Cas.* 337.

1862.  
 Ex parte  
 MILLER.  
 In re  
 MILLER.

failing that, an appeal to this Court within the time limited by the 12th section. *Carter v. Dimmock* decides nothing to the contrary.

A reply was not heard.

*The LORD JUSTICE KNIGHT BRUCE.*

This application was presented on the 7th of *November*, for the purpose of annulling an adjudication made on the 9th of *September* last, and advertised some few days after in the same *September*, and was, therefore, of course within the two months mentioned in the 24th section of the Bankruptcy Act, 1854. I think that the alleged bankrupt was not bound to go before the Commissioner for the purpose of disputing or questioning the validity or sufficiency of the adjudication made by the Commissioner, whether upon the same evidence only as that upon which the Commissioner proceeded, or upon that and additional evidence. The proceeding, therefore, questioning the adjudication was not, I think, a proceeding necessarily to be brought before the Commissioner. It was a proceeding by way of appeal, which the alleged bankrupt was entitled to bring before this Court.

It has been contended, however, that the period of limitation of twenty-one days is applicable to this case—a time which it may be assumed has been exceeded, for I do not regard the vain endeavour which was made to bring the Commissioner's attention to the subject. It has been said that the period of two months specified in the alteration made by the Bankruptcy Act, 1854, is not applicable in this instance. It would be, in my judgment,

ment, unreasonable, as well as inconvenient and mischievous, to hold that the period of two months is not applicable to this case. Such a decision would, I think, be productive of infinite mischief. The language of the act admits the extension, and the necessity of the case requires it; so that, upon the question of time, the objection wholly fails.

1862.

Ex parte  
MILLER.  
In re  
MILLER.

His Lordship then examined the merits of the case, and came to the conclusion that there was no good petitioning creditor's debt.

*The* LORD JUSTICE TURNER.

I agree, and for the same reasons.

The adjudication was accordingly ordered to be annulled with costs.



1863.



Ex parte THE DUDLEY AND WEST BROMWICH  
BANKING COMPANY.

In the Matter of WILLIAM HOPKINS,  
a Bankrupt.

Apr. 15.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

The twenty-one days from the date of a decision or order of the Court of Bankruptcy, within which, according to the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 12, an appeal from such decision or order must be entered, date from the day when the decision or order sought to be appealed from is pronounced, and not from that on which it is drawn up, although the latter date appears on the order.

MR. DANIEL and Mr. Little appeared in this case on behalf of the *Dudley and West Bromwich Banking Company* in support of an appeal from an order of the *Birmingham* District Court of Bankruptcy.

The order was pronounced on the 18th of *February*, 1863, and it was so dated on the file of proceedings.

It was not, however, drawn up till the 26th of *February*, 1863, as appeared by the initials of the registrar appended to that date at the foot of the order; and it was stated that the date, the 18th, had been filled in upon a blank space left for the purpose.

The appeal was not entered until the 17th of *March*, 1863.

Mr. Bacon and Mr. De Gex, for the Respondent *William Hopkins*, took a preliminary objection that the appeal was too late (a), citing *Ex parte Hookey*, *In re The*

(a) The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 12 requires an appeal to be entered within twenty-one days "from the date of any decision or order of the Court."

*The Risca Coal and Iron Company (a), and Ex parte Sanderson (b).*

1863.

Ex parte  
THE DUDLEY  
AND WEST  
BROMWICH  
BANKING  
COMPANY.  
In re  
HOPKINS.

Mr *Daniel* and Mr. *Little* submitted that *Ex parte Heslop (c)* was an authority in favor of the appeal being in time, the 26th of *February*, 1863 being the day from which the order sought to be appealed from ought to be held to speak.

*The LORD CHANCELLOR* said that the date of the order must be taken to be the 18th of *February*, 1863, and that the appeal was too late. His Lordship dismissed the appeal with costs.

(a) 4 *De G., F. & J.* 456.  
(b) 1 *Mac. & G.* 306.

(c) 1 *De G., M. & G.* 477 ;  
*S. C., De G., M. & G., Bcy. App.*  
77.





1863.

Ex parte WILLIAM PAINE and  
JOSEPH LENTON.

In the Matter of WILLIAM GLEAVES, a Bankrupt.

April 15.

Before The  
Lord  
Chancellor  
LORD  
WESTBURY.

A husband and wife mortgaged in fee land of which they were seised in right of the wife, to whom the equity of redemption was reserved by the mortgage deed. The husband became bankrupt, and in a suit by the wife for a

THIS was an appeal by *William Paine* and *Joseph Lenton*, the assignees of the above-named bankrupt, from an order of Mr. Commissioner *Holroyd*, who, after the decree made by the Lord Chancellor in the suit of *Gleaves v. Paine (a)*, admitted the Defendant *Thomas Pyke*, the mortgagee, to prove in the bankruptcy for the full amount of his mortgage debt.

The nature of the suit of *Gleaves v. Paine*, and the interests of the various parties thereto, and the Lord Chancellor's decree in question appear from the former Report.

Briefly

(a) 1 De G., J. & S. 87.

settlement of the equity of redemption on her and her children, and for redemption as against the mortgagee, and for foreclosure against the assignees and the husband, the assignees disclaimed, and a decree was made giving the wife the right to redeem as against the mortgages and settling the whole fee upon herself and her children, the husband not objecting. The mortgagee afterwards applied in the bankruptcy and was there allowed to prove the whole amount of his mortgage debt against the bankrupt's estate. *Held:—*

1. That the disclaimer of the assignees was intended only to accelerate the wife's right to redeem, if she elected so to do; but that if she elected not to redeem, and her bill was consequently dismissed with costs against the mortgagee, the assignees would no longer be bound by their disclaimer, their interest in the bankrupt's estate would remain unaffected by the dismissal of the bill, and they would be restored to their right to the bankrupt's life interest in the property in question.

2. That the proof must be varied by the addition of directions that in the event of the Plaintiff's bill being dismissed with costs the life estate of the bankrupt, which had been transferred to the assignees in bankruptcy, should be sold, the proceeds deducted from the amount of debt proved, and proof admitted only for the residue; but in the event of the Plaintiff redeeming the mortgage in the manner expressed in the decree, that the proof should be admitted without prejudice to any question as to the right to expunge the same either wholly or partially, or to keep the same alive for the benefit of the person paying the debt to the mortgagee.

Briefly recapitulated they were as follows :—

The bill was that of the wife of the bankrupt, by her next friend, as Plaintiff against her husband's assignees, *Thomas Pyke* above mentioned and the bankrupt as Defendants. The bankrupt and his wife had mortgaged in fee to *Thomas Pyke*, for 700*l.* advanced by him to the bankrupt, real estate belonging originally to the wife in fee, and wherein (no settlement having been made upon the marriage) the bankrupt had a life estate by the curtesy. By the mortgage deed, the equity of redemption was reserved to the wife, her heirs and assigns. The wife alleged that she had only joined in the mortgage as a surety for her husband, and filed her bill seeking a settlement of the equity of redemption on her and her children, and redemption against the mortgagee, and foreclosure against the assignees and her husband, the bankrupt.

The decree made by the Lord Chancellor upon an appeal from the Master of the Rolls was to the effect that, the Defendants *William Paine* and *Joseph Lenton* by their counsel disclaiming all right to redeem the mortgaged premises, his Lordship declared that the Plaintiff was entitled to redeem them. An account was then ordered to be taken of what was due to the mortgagee for principal and interest and costs; and upon the Plaintiff paying the same within six calendar months, the mortgagee was ordered to reconvey the premises to the trustees to be appointed of the settlement thereafter mentioned; and upon the Plaintiff redeeming the mortgaged premises as aforesaid, it was ordered that the same should be settled (the Defendant, the bankrupt, by his counsel consenting) upon certain trusts for the benefit of the Plaintiff and her children; but in default of the Plaintiff redeeming the mortgaged premises as aforesaid, it was ordered that the Plaintiff's bill should be dismissed

1863.

Ex parte  
PAINE.

In re  
GLEAVES.

1863.

Ex parte  
PAINE.  
In re  
GLEAVES.

as against the mortgagee with costs to be taxed and paid by the Plaintiff's next friend.

Mr. *J. H. Palmer* and Mr. *E. F. Smith* for the Appellants.

To admit this proof for the full amount of the mortgagee's debt without requiring him to give up his security, or at any rate putting him on some terms, is, we submit, a miscarriage of justice. The Commissioner ought at least to have required him to realize his security, permitting him only on those terms to prove for the balance of his debt. The security would remain merely a security although the Plaintiff should elect not to redeem, for then her bill would be dismissed with costs as against the mortgagee, and he would become entitled to the estate free from any equity of redemption so far as the Plaintiff is concerned: but in that event the disclaimer of the assignees would fall equally with the Plaintiff's rights, with reference to which and to which only that disclaimer was made. If the Plaintiff on the other hand should exercise the right of redemption given her by the decree, the mortgagee having been paid would have no right to prove on his own behalf, and the only question would be whether the wife would be entitled to stand in his place. With a view to that question, a proof for the full amount of the debt may be proper, but then it should be limited to the event of the Plaintiff exercising her right to redeem, and should be without prejudice to the question whether the proof should be expunged wholly on the ground of the mortgage debt having been by redemption paid off, or whether it ought to be wholly or partially retained for the benefit of the Plaintiff, paying such debt as surety.

They also referred to *Robertson v. Norris* (a); *Lockhart*

(a) 11 Q. B., N. S. 916.

*hart v. Hardy (a)*; and the *General Orders in Bankruptcy*, 1852: *Orders 55 sqq.*

Mr. *Cole* and Mr. *Rigby*, for the Respondent *Thomas Pyke*, in support of the Commissioner's order.

The wife has under the decree the option of either redeeming or not. If she redeem, the disclaimer by the assignees, which was absolute and not qualified, places her out of the category of a secured creditor, whilst, if she do not redeem, the same argument would apply to Mr. *Pyke* himself, for the rule as to a mortgagee not being allowed to prove for the full amount of his debt in bankruptcy without giving up his security only applies to securities which would, when given up, enure for the benefit of, and produce some advantage to, the general body of creditors. The effect of the decree, however, in the present case is such, that even if Mr. *Pyke* were to give up all his interest in the bankrupt's life estate as the price of being allowed to prove for the full amount of his debt against the bankrupt's estate, there would be nothing which the assignees could make available for the benefit of the creditors. The case therefore falls within the exception to the rule, and not within the rule itself; and the proof was properly admitted for the full amount of the debt.

They also referred to and commented on *Ex parte Shepherd (b)*.

A reply was not heard.

*The LORD CHANCELLOR.*

The proof cannot be left in the simple and unqualified form in which it now stands. There has been a misapprehension, I think, of the nature and effect of the decree.

Every

(a) 9 *Beav.* 349.

(b) 2 *M. D. & De G.* 204.

1863.

Ex parte  
PAINE.  
In re  
GLEAVES.

1863.

Ex parte  
PAINE.  
In re  
GLEAVES.

Every decree for redemption may be denominated in a sense an optional decree, inasmuch as it leaves it in the power of the Plaintiff either to pay the money due on the security and redeem it, or to submit to have the bill dismissed with costs against the mortgagee, which it is said—how accurately I do not stay to inquire—has the effect of a decree of foreclosure against the mortgagor. The present decree follows the usual form with one exception, namely, that inasmuch as the Defendants are several, and one set of them, being the assignees of the husband and therefore entitled to the first life estate and to the first right of redemption, has declined to redeem, the decree gives the first right of redemption to the wife, the person second in order.

It is clear, as well upon the language of the decree, as upon the nature of the facts, that all that the disclaimer of the assignees was intended to do and has in fact done was, and is, to accelerate the wife's right to redeem. To the wife, therefore, is given the first right of redemption.

Redemption however by her is optional. And should she hereafter deliberately elect not to exercise her right to redeem, the disclaimer of the assignees cannot, after the cesser of the purpose for which it was first intended, be considered as amounting either to a contract or to a repudiation of the estate.

It is urged however for the Respondent that in the event of the wife refusing to exercise the right of redemption given to her by the decree, the other part of that decree will take effect by which her bill will be dismissed with costs as against the mortgagee; and it is said that in that event on the ground either of the disclaimer being equally operative, or on the ground of the general principles

principles of the Court, the antecedent right of the assignees in respect of the bankrupt's estate would be extinguished.

But the effect of the decree in that contingency would only be to dismiss the bill and probably, by preventing any further bill by the wife, to annihilate her equity of redemption. For that equity of redemption being a thing claimable only in this Court, the dismissal of the bill out of the Court would extinguish the equity of redemption, which would consequently be no longer enforceable. That however applies only to the individual who has filed the bill; and I do not think that, because the Plaintiff fails to redeem, therefore any right of redemption belonging to the Defendants is equally lost.

It follows therefore that should the wife fail to redeem, and her bill be consequently dismissed, the assignees would no longer be bound by their disclaimer, their interest in the bankrupt's estate would remain unaffected by the dismissal of the bill, and they would be restored to their right to the bankrupt's life interest in the property in question.

In this state of things, nothing having been done, and it being very uncertain what will be done under the decree, Mr. *Pyke*, the mortgagee, applies in the bankruptcy to be allowed to prove his debt.

The assignees contend that the ordinary rule should have been applied, and that the proof should, if admitted for the full amount, have been so admitted subject to the contingency of this decree coming into operation.

The decree may come into operation in either of two ways, viz., either by way of redemption or by dismissal  
of

1863.

Ex parte  
PAINE.  
In re  
GLEAVES.

1863.

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PAINE.

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of the bill. In the former alternative, the life interest of the bankrupt is annihilated by the effect of the decree, and any direction for the sale of such interest would require to be made subject to the contingency of the election by the Plaintiff to exercise her right to redeem. In the latter alternative, the life interest would remain intact, and in that event the order should direct the sale of the life interest, and allow proof for the balance after deduction of the proceeds of sale. A further question will arise if the wife redeems the mortgage, whether she will become entitled to the benefit of the mortgagee's proof; but that is a question which will arise in the bankruptcy.

I think the proof should be varied in the following way, viz.—by adding to it directions that in the event of the Plaintiff's bill being dismissed with costs, the life estate of the bankrupt which has been transferred to the assignees in bankruptcy shall be sold, the proceeds deducted from the amount of debt proved, and proof admitted only for the residue; but that in the event of the Plaintiff redeeming the mortgage in the manner expressed in the decree the proof shall be admitted subject and without prejudice to any question as to the right to expunge the same, either wholly or partially, or to keep the same alive for the benefit of the person paying the debt to the mortgagee.



1863.

In the Matter of THE JOINT STOCK COMPANIES  
ACTS, 1856 & 1857, and

In the Matter of THE MOSELEY GREEN COAL  
AND COKE COMPANY LIMITED.

FOX'S CASE.

**T**HIS was an appeal by Sir *Charles Fox* from the refusal of Mr. Commissioner *Goulburn* to vary the list of contributories of the above-named company, which was being wound up under the above-mentioned acts, by striking out the Appellant's name therefrom. The list had been settled in the unavoidable absence of the Appellant, and the object of the application to the Commissioner was to obtain a reviewal of that settlement so far as it regarded the insertion of the Appellant's name in the list.

*April 18.  
Before The  
Lord  
Chancellor  
LORD WEST-  
BURY.*

Where a person's name appeared as that of a shareholder in a joint stock company's register, and minute and other books, and had been so included in the yearly returns to the registrar of joint stock companies, but it appeared on the evidence that he had never agreed, or acted in such a manner as to induce others to be-

The facts on which the official liquidator based his claim to include the Appellant in the list were, that his name appeared as that of a shareholder in the register, journal, ledger, share ledger, share certificate book and minute books of the company, and that it had been included in the returns of the years 1861 and 1862 to the registrar of joint stock companies.

The

lieve that he had agreed, to become a shareholder in the company, and that he had promptly repudiated an attempt on the part of the secretary of the company to place him in the position of a shareholder:—*Held*, that upon an application in Chancery under the Joint Stock Companies Act, 1856, s. 25, and in bankruptcy in the matter of the winding up to remove his name from the register and from the list of contributories, he was entitled to the relief sought.

The books of a company are, under the Joint Stock Companies Act, 1856, s. 40, only evidence as between shareholders, and cannot be accepted as evidence on the question whether a person is or is not a shareholder.



1863.

In re  
MOSELEY  
GREEN COAL  
AND COKE  
COMPANY  
LIMITED.  
Fox's Case.

The facts on which the Appellant relied as entitling him to have his name removed from the list of contributories as settled were, in effect, that he was the company's consulting engineer, in which capacity the company was in his debt, and that he was not otherwise connected with the company, save that he had been employed in getting it up; that he had never applied for or accepted any shares in it, and that his name had been wrongfully inserted as that of a shareholder in the various places in which it so appeared in the company's books; that he had been often pressed to take shares in the company and had as often refused so to do, nor had he ever paid any money in respect of shares; that he had received a notice by a letter of the secretary dated the 30th of *October*, 1861, of an allotment of shares to him, and that the certificate was a form of receipt for signature; that he had not signed it but had written a letter in reply and carried that letter with the receipt to the secretary himself telling him it was a "try on," and that the letter was as follows:—"I am sorry to say that I do not think I should be justified in complying with your request to sign the receipt for twenty shares in the *Moseley Green Company* inclosed in your note of yesterday, as doing so would, in the event of the company being wound up, make me a contributory, which was certainly never intended. What I undertook to do was, to receive twenty shares (paid up) in part payment of my professional charges spread over the execution of the whole work; but I carefully explained that I should not place myself in a position to be subject to calls, and this arrangement, in the event of the works going on under my charge, I am willing to carry out. From this you will perceive that I am of opinion that should the company now break up, I am in no way bound to incur any responsibility in respect to shares. I accordingly return the certificate for twenty shares and the receipt you sent me ;"

me;" that he had attended the meetings of the company, if at all, always as engineer, and never as a shareholder, and that he had never taken the chair at any meeting.

Mr. *Amphlett* and Mr. *Doria* for the Appellant.

Before the Appellant can be put upon the list of contributories he must be shown to have been a shareholder; *Joint Stock Companies Act*, 1856, ss. 61, 65. His name is on the register of shareholders it is true, but that alone is not enough to constitute him a shareholder: his acceptance of the shares endeavoured to be saddled upon him must also be shown; *Ib.* s. 19. But any such acceptance in the present case on the part of the Appellant is clearly negatived by the evidence. The Commissioner, having regard to the *Joint Stock Companies Act*, 1856, ss. 25, 60, and the *Joint Stock Companies Act*, 1857, s. 9, and also the dicta in *Birch's Case (a)* and *Whittet's Case (b)*, thought that the Appellant should have applied with all speed after hearing that his name had been put on the register to have it removed therefrom, and that as he did not do so the register was, under the 26th section of the Act of 1856, conclusive evidence of his status as a shareholder, and his consequent liability to be placed on the list of contributories. But the entry in question is at most *prima facie* evidence only and capable of being rebutted, and is in the present case actually rebutted by positive evidence to the contrary. And as the Appellant never was in fact a shareholder it was never incumbent on him to apply, under the 25th section of the act of 1856, for a rectification of the register by the omission therefrom of his name.

[The LORD CHANCELLOR asked the counsel for the official

(a) 2 De G. & J. 10.

(b) *Ib.* 577.

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official liquidator, with reference to the cases which had been cited, whether they were willing that the present application should be considered as made as well in Chancery as in Bankruptcy.]

Mr. Cole and Mr. Roxburgh, for the official liquidator, having signified their consent, were then called upon on his behalf. Their argument was to the following effect:—

The Commissioner could not with the authorities which have been cited on the other side before him have made any other order than that which he has made. He had no jurisdiction to amend the register by striking the Appellant's name off it, and consequently no power to exclude him from the list of contributories. *Burnes v. Fraser* &c. disposes of the argument raised upon section 19 of the Act of 1856, upon the point of acceptance of shares by the shareholder, by showing that as between the Appellant and the company the acceptance must be treated as a requisite imposed upon him for the benefit of the company, and the absence of such acceptance no ground for allowing him to retire from his contract. Moreover, here the entries in the various books of the company are, under the 40th section of the Act of 1856, evidence as to the fact of the Appellant's status as a shareholder. [The LORD CHANCELLOR remarked that the section in question applied only as between shareholders, and had no effect in making the books of the company evidence on the question whether a person was a shareholder or not.]

A reply was not heard.

*Th*

*The LORD CHANCELLOR.*

I think that after the two cases which have been referred to by the Appellant's counsel the Commissioner could not have taken any other course than that which he has taken. At the same time I think that there is nothing upon the evidence to show that the Appellant ever agreed, or acted in such a manner as to induce other people to believe he had agreed, to become a shareholder in respect of these shares. On the contrary it appears to have been a misunderstanding on the part of the secretary, for which the conduct of the Appellant gave no warrant, to enter him in the company's register.

It is said that he attended meetings of the company. Perhaps he did; but he states, and his statement remains unquestioned, that it was his duty to attend the meetings of the company in his capacity of its engineer. The books of the company cannot be received as evidence that he attended those meetings in the capacity of a shareholder.

Nor can any imputation of want of promptitude be laid to his charge in his mode of dealing with the ingeniously devised plan of the secretary for making him out a shareholder. And if the secretary's action arose from misconception of facts, the whole thing ought to have terminated upon the misconception being dispelled.

If, therefore, this had been an application to the Court of Chancery anterior to the winding-up of the company, the Appellant would in my judgment have been entitled to have his name removed from the register.

The proper mode of dealing with the whole matter as it now comes before the Court will be,—counsel for the  
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MOSELEY  
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AND COKE  
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LIMITED.  
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~~~~~  
In re
MOSELEY
GREEN COAL
AND COKE
COMPANY
LIMITED.
Fox's Case.

official liquidator consenting,—to allow the amendment of the present notice of motion by entitling it in Chancery as well as in Bankruptcy, and making it extend to an application, under the 25th section of the Act of 1856, to remove the Appellant's name from the register of shareholders, as well as an application to remove that name from the list of contributories.

Upon the notice so amended I shall declare that the Appellant never became or intended to become a shareholder in the company, and direct the removal of his name as well from the register as from the list of contributories.

1863.

Ex parte HENRY RIDOUT DOWNMAN.

In the Matter of HENRY RIDOUT DOWNMAN,
a Bankrupt.

THIS was an appeal of the bankrupt from an order of Mr. Commissioner *Goulburn* suspending the Appellant's order of discharge for twelve months, and refusing protection until the Appellant had undergone six months' imprisonment; the ground of the order being that the Court was of opinion that the Appellant could not have had, at the time his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same, and that his insolvency was attributable to a long course of, and continuance in, rash and hazardous speculation, and also to unjustifiable extravagance in living.

The Appellant was described as a promoter of public companies, and the unsecured debts which appeared upon his balance-sheets and which amounted to 1,141*l.*, had been incurred in respect of the promotion of a company called "*The Warmley Colliery and Spelter Works Company Limited.*"

April 18.
Before The
Lord
Chancellor
LORD
WESTBURY.
In considering
the question of
a bankrupt's
discharge with
reference to the
provisions of
the Bankruptcy
Act, 1861,
s. 159, rule 3,
care, and even
some amount
of severity, is
properly
brought to
bear by the
tribunal
which has to
decide the
question.
The debts,
the contract-
ing of which
by the bank-
rupt, without
reasonable
or probable

ground of expectation of being able to pay the same, is made condemnatory by the section and rule in question, must be debts incurred by the bankrupt and within the scope of the existing proceedings in bankruptcy.

In construing the words "rash and hazardous speculation" in the same section and rule, "rash" is the important word, that is to say, the speculation made condemnatory by the section and rule must be such as no reasonably prudent man would have entered into.

Circumstances under which a bankrupt was held, within the meaning of the section and rule above mentioned, neither to have contracted debts without reasonable or probable ground of expectation of being able to pay the same, nor to have been guilty of rash and hazardous speculation conducing to his insolvency, nor of unjustifiable extravagance in living.

1863.
 Ex parte
 DOWNMAN.
 In re
 DOWNMAN.

This company, although eventually dissolved for insufficiency of subscriptions, was actually formed and registered, and thereupon the Appellant became entitled to two sums, amounting respectively to 5,000*l.* and 3,000*l.*, from two gentlemen named *Marsden* and *Jones* respectively, the former the owner of a colliery the latter of a mine, which if the business of the company had been carried on were to have been taken over by it; and for the assurance of which colliery and mine respectively to the company accordingly Messrs. *Marsden* and *Jones* were respectively under contract with the Appellant.

The two sums of 5,000*l.* and 3,000*l.* were to be paid respectively in certain proportions in cash and shares of the company; and upon the dissolution of the latter, Messrs. *Marsden* and *Jones* respectively declared their contracts determined, leaving the Appellant to his remedy against them by way of an action for damages, and a *quantum meruit* for his services in connection with the negotiation of the sales to the company, or otherwise as he might be advised.

No proceedings had been in fact taken against Messrs. *Marsden* and *Jones*, or either of them, by reason of want of assets in the bankruptcy, but they were described as responsible persons.

The Appellant was arrested in *May*, 1862, upon a writ of execution founded on a bill of exchange, and was adjudged a bankrupt on his own petition on the 20th of the following month. His failure he attributed to the non-payment of the above-mentioned sums of 5,000*l.* and 3,000*l.* There were entries of 126*l.* for liabilities, but none for personal expenditure in the balance-sheet. On the 27th of *June*, 1862, the Appellant applied for his release from prison, but it was refused, as it was also
 on

on the 20th of the *July* following, unless he could find bail. The 18th of *August*, 15th of *September*, and 27th of *November*, 1862, were devoted to the question of his last examination, which he passed on the last-mentioned day, and the question of his discharge was adjourned to the 26th of *January*, 1863. Thence it was again adjourned to the 2nd of *March*, upon which day, after the Appellant had been examined *vivâ voce*, the learned Commissioner took time to consider his judgment.

This he delivered on the 9th of *March*, 1863, in the terms set out below (a) (whence and from the judgment of

(a) "The bankrupt asks for an order of discharge. He is not so much opposed by the assignee who opposed him in the first instance; but the case has been left in the hands of the Court. This is the bankrupt's third failure. Under his first failure the debts were 1,700*l*, and there were no assets. Under the second insolvency the debts were 3,500*l*, with a similar result as to assets; and under the present failure the debts are 1,200*l*, and the bankrupt does not produce a single shilling for his creditors. The bankrupt, it appears, has resided at *Boulogne*, a place much frequented by persons of his description; at the *Upper Mall*, *Hammer-smith*; at *Notting-hill*; at *Willesdon*, near *Barnes*, *Surrey*; and other places; his offices being in *Copthall buildings*, and in *Size-lane*. Although the bankrupt has twice before failed, he does not seem to have been by any means chary in his expenditure. The outlay is stated at 600*l*. per year. When the case came before me I

asked the bankrupt to state what reasonable or probable expectation he had of being able to pay his present debts; but the only explanation given was, that he made certain contracts, and that he expected them to be fulfilled, thus hoping to be enabled to pay his creditors. The bankrupt having, in right of his wife, a separate income of 500*l*. per year, was enabled to keep up a certain appearance in the world, and people were deluded into giving him credit upon the supposition that he was a man of property—the fact being, that his wife's income could never be available in any way for the payment of the creditors. It is not to be endured that men like the bankrupt, who are constantly making their appearance in this Court, should be allowed to defy their creditors. I cannot do less than suspend the order of discharge for twelve months, and I shall not allow protection until the bankrupt has suffered six months' imprisonment."

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DOWNMAN.
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DOWNMAN.

of the Lord Chancellor the other material facts of the case will appear), and made the order now under appeal.

Mr *Bacon*, for the Appellant, who, notwithstanding the Commissioner's refusal of protection, was still at large, read the Commissioner's judgment, and commented on the terms of the Bankruptcy Act, 1861, ss. 158, 159 (*a*). He contended that the Appellant's conduct did not deserve the censure passed upon it by the Commissioner, that his claims against Messrs. *Marsden* and *Jones* were independent of, and did not fall with, the collapse of the company; and that upon the whole case he was entitled to his discharge.

Mr.

(*a*) These, so far as they are material, are respectively as follow:—

"158. After the bankrupt has passed his last examination, unless an order of discharge shall have been previously made as hereinbefore provided, the Court shall appoint a sitting for the purpose of considering the question of granting the bankrupt such order. Fourteen days' notice of such sitting shall be given in the *London Gazette*, and such newspapers as the Court shall direct. The assignees or any creditor who has proved may be heard against such discharge.

"159. In granting orders of discharge the following rules shall be observed:—

"3. If . . . there shall be made, or shall appear to the Court to exist, objections to the granting of an immediate discharge, the Court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in

and under which his debts have been contracted; and if the Court shall be of opinion that the bankrupt has . . . or that he could not have had at the time when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same, . . . or, whether trader or not, that his insolvency is attributable to rash and hazardous speculation, or unjustifiable extravagance in living, . . . the Court may refuse an order of discharge, or may suspend the same from taking effect for such time as the Court may think fit, or may grant an order of discharge subject to any condition or conditions touching any salary, pay, emoluments, profits, wages, earnings or income which may afterwards become due to the bankrupt, and touching after-acquired property of the bankrupt, or may sentence the bankrupt to be imprisoned for any period of time not exceeding one year from the date of such sentence."

Mr. *Roxburgh*, for the assignee, left the case in the hands of the Court.

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Ex parte
DOWNMAN.

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DOWNMAN.

The LORD CHANCELLOR.

The learned Commissioner is much to be commended for the strict examination which he has made of this case, especially as there was no opposing creditor before him. I think he was right in referring to the bankrupt's position at the time when he incurred these debts, and that his reference in this respect was correct under the 159th section of the statute.

Still it is incumbent upon the Court, with regard to that statute, to look only to debts which actually appear to have been incurred by the bankrupt and which come within the reach of the present insolvency.

The learned Commissioner charges the bankrupt in the first place with contracting these debts without any reasonable or probable ground of expectation of being able to pay them. But the only transactions in which the bankrupt appears to have been engaged during the period of time in which the debts were contracted were transactions relating to the purchase of two large concerns, one a colliery, the other a mine. What may have been the prudence of these transactions may be considered hereafter, but certainly they appear to have been bonâ fide contracts. They seem to have been likely to afford the bankrupt a considerable sum of money. Supposing, therefore, that these were bonâ fide transactions and not deserving the name of rash and hazardous speculations, and supposing the debts specified in the balance sheet to have been incurred only or chiefly by reason of these transactions, I should be unable to come to the conclusion that the debts were incurred
without

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without any reasonable or probable ground of expectation of being able to pay them. I have no reason to believe but that the assignee and the creditors have stated to the Court what they believe to be the facts, and that in the honest discharge of their duty they have given their opinion to the Court without any improper collusion or connivance with the bankrupt. The proceedings taken by the assignee also confirm the supposition that these transactions of the bankrupt were bonâ fide transactions. I must say, therefore, that, although I am very unwilling to come to any different conclusion from that of the learned Commissioner, I do not agree with him in his first conclusion, that these debts, amounting to about the sum of 1,100*l.* and which, with the exception of 70*l.*, are wholly attributable to the expenses incurred by the bankrupt about the transactions in question, are clearly proved to have been incurred without any reasonable or probable ground of expectation of being able to pay the same. If either of the transactions in which the bankrupt was engaged had succeeded, he would have received a sum of money which would have much more than covered the amount of the debts he had incurred.

The next consideration is whether the contracts in question, although bonâ fide contracts, deserve the name of rash and hazardous speculations.

It is difficult to assign the limits to be placed upon language so general in its character and description as that found in this clause of the act. Its terms must be obeyed, but they are so indefinite as to leave to the judge who has to interpret them a larger amount of discretionary power than in a statute of this nature ought to be entrusted to any tribunal—a discretionary power the existence of which may occasionally lead to the

the conclusions of one tribunal being at variance with the conclusions of another.

A gentleman contracts with the owner of a mine to give him a certain sum of money for that mine, the contract to a certain extent being made dependent upon the formation of a company. These are transactions which occur with frequency. Frequently flourishing and beneficial interests have had their commencement in arrangements and contracts of that description. I cannot say that a transaction of that nature, apparently a bonâ fide one in this sense, that it is entered into between the bankrupt and the mine owner with a belief on the part of both that it is a practicable contract, a thing capable of being brought into operation fairly and honestly, comes under the denomination of being rash. Hazardous it is no doubt in this sense, that there may be danger and uncertainty attending its success; but in order to come within the condemnatory clause of this statute, the transaction must be a speculation, a rash speculation and a hazardous speculation. Probably the important word here is "rash," that is to say, it must be a speculation in which no reasonably prudent man would have engaged. I cannot say, having regard to these contracts and to what has taken place respecting them, that I think they can be judicially denominated "rash and hazardous speculations" within the meaning of the statute.

There then remains a third point which has been adverted to. There is undoubtedly considerable truth in the learned Commissioner's remarks with regard to the bankrupt having traded upon false credit, owing to the existence of his wife's separate estate. But that rather points to the state of the law which allows such a separate estate to exist, and I do not think that the fact can be ad-

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Ex parte
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DOWNMAN.

duced to prove unjustifiable extravagance of living on the part of the bankrupt. That ought to appear from the balance sheet. But the characteristic of the balance sheet in the present instance is that there is not apparently here a single debt that does not come under one or other of these two descriptions, namely:—debts having immediate relation to the two contracts upon which the bankrupt was depending, and debts, two or three in number only, which appear to have been contracted for the purchase of a share in a Canadian railway, and for the purchase of a share in a mining claim, which is the subject of a counter claim, from a Mr. *De Castro*, who has neither proved under the bankruptcy nor in any way contributes to oppose the bankrupt's discharge.

Therefore, upon a proper review of the whole circumstances of the case, and limiting the inquiry to the case of debts coming within the immediate scope of the present bankruptcy, those being the debts to which the attention of the judge must be confined in dealing with the 159th section of the statute, it is not in my judgment fit to brand the bankrupt judicially with the mark that his debts have been contracted without reasonable or probable ground of expectation of his being able to pay them, or that debts have been contracted by him by reason of contracts which must be held to be rash and hazardous speculations.

I agree with the learned Commissioner in his view of the necessity for examining these cases with care and, even, I may add, with some amount of severity; but after that has been done, in the present instance I cannot bring the case within the fair meaning of the act, and I think, therefore, the order of discharge ought to have been and must now be granted to the bankrupt in the usual way.

[Some

[Some discussion then took place as to the deposit, which was stated at the bar to have been contributed by the bounty of the Appellant's friends, and as to the costs of the assignee, it being alleged at the bar that there were no assets in the bankruptcy.]

1863.

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 DOWNMAN.
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 DOWNMAN.

The LORD CHANCELLOR.

With regard to deposits made by a bankrupt, they must be treated as the bankrupt's monies and dealt with accordingly. In the present case the deposit may be returned to the bankrupt. The appearance of the assignee here is, I think, under the circumstances of the case, right, but I must leave him to get his costs out of the estate.





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[Some discussion then took place as to the deposit, which was stated at the bar to have been contributed by the bounty of the Appellant's friends, and as to the costs of the assignee, it being alleged at the bar that there were no assets in the bankruptcy.]

1863.
Ex parte
DOWNMAN.
In re
DOWNMAN.

The LORD CHANCELLOR.

With regard to deposits made by a bankrupt, they must be treated as the bankrupt's monies, and dealt with accordingly. In the present case the deposit may be returned to the bankrupt. The appearance of the assignee here is, I think, under the circumstances of the case, right, but I must leave him to get his costs out of the estate.

In the Matter of THE JOINT STOCK COMPANIES ACT, 1856 and 1857; and
In the Matter of THE MOSELEY GREEN COAL AND COKE COMPANY LIMITED.

BARRETT'S CASE.

THIS was an appeal motion in bankruptcy by Mr. *Osman Barrett* seeking the reversal of an order made by Mr. Commissioner *Goulbourn*, in whose Court the *Moseley Green Coal and Coke Company Limited* was being wound up under the above-mentioned

1864.
June 8.
Before *The Lord Chancellor*
LORD
WESTBURY.
Shares in a joint-stock company were allotted to and registered in
Acts,

the name of a person on the application in his name of another person to whom the former had lent the use of his name for the purpose, on condition that he was to be exposed to no liability in consequence, and who paid the deposit on the shares. The company being subsequently ordered to be wound up under the Acts of 1856 and 1857, and nothing having been done which could bind the company towards releasing the registered shareholder from his liability:—*Held*, that whatever equities in the shape of right to indemnity might exist between him and the person applying in his name and the directors who had entered into an arrangement for his release, which was ultra vires and had not been sanctioned by the company, his name was properly placed on the register and list of contributories.

Vol. I—4.

U

D.J.S.

*L. Eng. C. 24 d.
Bankruptcy 33*

1864.

 In re
 MOSELEY
 GREEN COAL
 AND COKE
 COMPANY
 LIMITED.
 BARRETT'S
 CASE.

Acts, settling the Appellant's name on the list of contributories for 250 shares, or a reference back to the Commissioner to resettle the list; and also an original motion in Chancery under the Joint Stock Companies Act, 1856, s. 25, for rectification of the register by erasing therefrom the Appellant's name as a shareholder (a).

The facts of the case, as also the scope of the arguments on the part of the Appellant, sufficiently appear from the Lord Chancellor's judgment.

Mr. *Giffard* and Mr. *C. T. Swanston*, for the Appellant, relied upon *Cox's Case* (b), and *Whittel's Case* (c).

Mr. *E. F. Smith* for Mr. *Corbett*, was willing that his name should be put on the lists in lieu of that of the Appellant, if the Court should think that course proper; but

Mr. *Willcock* and Mr. *Roxburgh*, for the Official Liquidator, declining to accept that offer, they were not called upon.

The LORD CHANCELLOR.

The first question is, whether the Appellant's name was placed upon the public register of shareholders in this company in such a manner as to make him liable to the consequences of being so placed as between himself and the shareholders.

What took place between Mr. *Corbett* and the Appellant undoubtedly warranted the placing of the Appellant's
 name

(a) See *For's Case*, 3 De G., J. & S. 465; S. C., *supra*, p. 245; *Bird's Case*, 4 De G., J. & S. 200.
 (b) 4 De G., J. & S. 53.
 (c) 2 De G. & J. 577.

name upon the list of shareholders for 250 shares. It is immaterial to the shareholders of the company what secret agreement may have been made between the person so registered and any other person with regard to his liability. The shareholder has a right to be put on the register in respect of his shares. All the other shareholders have a right as between themselves and him to look to and depend upon the register and to take the register as evidence of his liability, unless that liability has been determined in a conclusive and binding manner by transactions on the part of the directors, which are legally valid and good to bind the company.

The transactions in the present case are these:—The Appellant consented to his name being put on the register at the instance of Mr. *Corbett*. Mr. *Corbett's* position with regard to the company was—under articles of agreement dated the 31st of *January*, 1861—that of vendor of certain tracts or seams of coal which the company was formed to work. The purchase-money was to be a large sum, and was to be in part paid or accounted for to Mr. *Corbett* in shares of the company.

The powers of the directors are defined by the articles of association. The powers of the general meetings of the company are also there defined.

The directors were anxious to start the company, as the expression is, and for that purpose they wished to obtain a certain amount of subscriptions. They told Mr. *Corbett* that if he would subscribe for 250 shares in addition to the shares which were to be handed over to him in part payment of his purchase money, a third person would subscribe for another named number of shares, and that that subscription would enable them to start the Company.

1864.

In re
MOSELEY
GREEN COAL
AND COKE
COMPANY
LIMITED.
BARRETT'S
CASE.

1864.

—
In re
MOSELEY
GREEN COAL
AND COKE
COMPANY
LIMITED.
BARRETT'S
CASE.

Mr. *Corbett* says that it was suggested to him that it would be better, and would give an appearance of greater solidity to the company if this subscription for 250 shares was made by him in another name. He accordingly suggested the name of the Appellant, and applied to him for that purpose; and what passed between them, although it was coupled with a personal engagement on the part of Mr. *Corbett* that the Appellant should not be exposed to any liability, yet did, as I have already mentioned, so far as the company was concerned, give authority to Mr. *Corbett* from the Appellant to put down the Appellant's name as a subscriber for 250 shares.

Subsequently disputes arose between Mr. *Corbett* and the directors. Mr. *Corbett* complained that he had been induced to obtain this subscription for 250 shares by the representation as to the subscription on the part of the third person for a given number of shares, which representation had not been fulfilled. An action was brought and a bill was filed, and it ended in Mr. *Corbett* recovering judgment for 250*l.*, being the deposit of 1*l.* per share which he had paid on the shares taken in the Appellant's name, and in his also getting a decree for a large amount from the company. The result was, that a new arrangement and compromise was made between the directors and Mr. *Corbett*, and that under that new arrangement the relations between Mr. *Corbett* and the company were placed upon an entirely different footing, the result of the indenture whereby it was carried into effect being that Mr. *Corbett* was to be treated as entitled to recover the 250*l.* in the action; that one of the pleas in that action setting up misrepresentation on the part of Mr. *Corbett* should be withdrawn; that the subscription made in respect of the Appellant's shares should be regarded as annulled; and that Mr. *Corbett* should get back

back and deliver up to the company all shares which had been transferred to him in pursuance of the agreement of the 31st of *January*, 1831, other than certain 2,030 shares already transferred by him. Under this agreement he states that he did give up to the company 1,230 shares.

1864.

 In re
 MOSELEY
 GREEN COAL
 AND COKE
 COMPANY
 LIMITED.
 BARRETT'S
 CASE.

If these transactions which are thus stated to have taken place between Mr. *Corbett* and the directors were transactions which bound the company, the result would be that the company acknowledged Mr. *Corbett* as the true subscriber—agreed to annul the Appellant's subscription—agreed to put an end to Mr. *Corbett's* equitable subscription—and agreed that Mr. *Corbett* should have the money repaid.

But I do not find that any one of these transactions which the directors took upon themselves to carry into effect as between themselves and Mr. *Corbett* in any respect bound the company or were within the compass of the powers and authorities of the directors. Although therefore there is an entry in the share ledger made by the authority of the directors, by which 250 shares are expressed to be transferred from the Appellant's name, yet there is no single act, no single dealing of release or alteration of agreement as between Mr. *Corbett* and the company made by the directors which is shown to be, or even attempted to be shown to be, within the powers and authorities of the directors.

The original contract of subscription made by the Appellant through the agency of Mr. *Corbett* therefore remains still available to the company, and these illegal transactions between Mr. *Corbett* and the directors do not bind it or in any respect avail to release the Appellant from his liability.

It

1864.

In re
MOSELEY
GREEN COAL
AND COKE
COMPANY
LIMITED.
BARRETT'S
CASE.

It is said that there cannot be an ownership of the same shares in two persons.

There is an ownership here on the part of the Appellant which makes him liable to the shareholders. There may be contracts and dealings between him and Mr. *Corbett* which may give the Appellant an equity to call upon Mr. *Corbett* to indemnify him, which indemnity might involve the transfer of the shares; but the question to be considered is not who is the person who was the owner, but who is the person who was liable to the shareholders in respect of legal tenancy at the time when the tree was cut down—at the time of the winding-up order? That was the Appellant. The dealings and transactions to which I have adverted, whatever validity they may have in creating personal contracts and personal equities as between the Appellant and Mr. *Corbett* and the directors, are not available to the Appellant as a shield wherewith to protect himself from the claims of the shareholders in this company who were innocent of any participation in those dealings and transactions, and who are not legally affected by the result of these irregular dealings of the directors which they had no legal authority from the company to enter into.

The learned Commissioner has, therefore, in my judgment, arrived at a right conclusion with respect to the list of contributories, and the Appellant's name must remain thereon. His motion to rectify the register must also be refused, and he must pay the costs of the appeal and of the motion.

1864.

Ex parte CHARLES BENJAMIN GORELY.

In the Matter of JOHN BARKER, a Bankrupt.

THIS was an appeal by *Charles Benjamin Gorely*, the owner of certain property at *Dover*, of which the bankrupt *John Barker* was the lessee, and by certain mortgagees of the lease, from the decision of Mr. Commissioner *Goulburn* on certain questions submitted to the Court upon a special case under the provisions of the Bankruptcy Act, 1861, s. 56.

The precise terms of these questions it is not necessary for the purposes of this report to refer to in detail. It is sufficient to say that they had reference to the mode in which, as between the various parties to the appeal, were to be applied certain moneys which had been paid by certain insurance companies partly in respect of the demised property which had been burnt down, and partly in respect of certain trade fixtures upon the property which had been burnt with it, such fixtures having been provided by the bankrupt, and he being, under one of the covenants in his lease, bound to deliver them up to the lessor on the determination of the lease.

The main question argued was upon the construction of the preamble to and the 83rd section of the stat. 14 *Geo. 3*, c. 78, which are respectively set out below (a), and the statt.

(a) Stat. 14 *Geo. 3*, c. 78, preamble: "Whereas an act of parliament, made and passed in the twelfth year of his present Majesty's reign, intituled, An Act for the better regulation of buildings and party-walls within the cities of *London* and *Westminster*, and the

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The 83rd section of the 14 *Geo. 3*, c. 78, is of universal and not of locally circumscribed application, but only applies to insurance moneys upon houses and buildings. Moneys paid in respect of the insurance of trade fixtures are not within its application.

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statt. 7 & 8 *Vict.* c. 84, and 18 & 19 *Vict.* c. 122, so far as they respectively except from the general repeal of the statute of 14 *Geo.* 3 the 83rd section thereof.

Mr.

liberties thereof, and other the parishes, precincts, and places in the weekly bills of mortality, the parishes of *Saint Mary-le-bon* and *Puddington*, *Saint Pancras*, and *Saint Luke*, at *Chelsea*, in the county of *Middlesex*, and for the better preventing of mischiefs by fire within the said cities, liberties, parishes, precincts and places: and for amending and reducing the laws relating thereto into one act, and for other purposes, hath been found insufficient to answer the good purposes intended thereby: and whereas it may tend to the safety of the inhabitants and prevent great inconveniences to builders and workmen employed in buildings within the said cities, liberties, parishes, precincts and places, if the regulations contained in the said act were repealed, and other regulations and provisions respecting such buildings were established by law:"

Sect. 83: "And in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it further enacted by the authority aforesaid, That it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other

buildings against loss by fire, and they are hereby authorised and required, upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings, have been guilty of fraud or of wilfully setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing such house or houses or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings, are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

Mr. *F. Meadows White* for the Appellants, referring to stat. 12 *Geo. 3*, c. 73, s. 34, and *Filliter v. Phippard* (a); *Simpson v. The Scottish Union Insurance Company* (b), and *Richards v. Easto* (c), contended that, notwithstanding the locality of the property, they were entitled to the benefit of the stat. 14 *Geo. 3*, c. 78, s. 83, which he argued was of universal and not of locally circumscribed application, and thereunder to have the whole of the moneys in dispute laid out in rebuilding the property.

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Mr. *Holl*, for the Respondents the creditors' assignees, referring to stat. 14 *Geo. 3*, c. 78, s. 84, and 7 & 8 *Vict.* c. 84, and to *Vernon v. Smith* (d); *Dumergue v. Rumsey* (e); *Poole's Case* (f); and *Amos on Fixtures* (g), in support of the order under appeal, contended that the section in question had no application beyond the metropolitan district, and that the moneys in dispute belonged to the bankrupt's estate.

Mr. *Meadows White*, in reply to a question of the Lord Chancellor, who drew a distinction between the moneys paid by the offices for the insurance of the house and buildings, and the moneys paid by them for the insurance of the fixtures, and in support of the right of the Appellants to the latter moneys also, referred to *Gibson v. Hammersmith and City Railway Company* (h); *Walmsley v. Milne* (i); *Ex parte Broadwood* (k); *Ex parte Loyd* (l); and *Leader v. Homewood* (m).

The

- (a) 11 *Q. B.* 347.
- (b) 1 *H. & M.* 618.
- (c) 15 *M. & W.* 244.
- (d) 5 *B. & Ald.* 1.
- (e) 2 *H. & C.* 777.
- (f) 1 *Salk.* 368.

- (g) *Page* 321, ed. 2.
- (h) 2 *Dr. & Sm.* 603.
- (i) 7 *C. B. (N. S.)* 115.
- (k) 1 *M. D. & De G.* 631.
- (l) 3 *Deac. & C.* 765.
- (m) 5 *C. B. (N. S.)* 546.

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The first question depends upon the inquiry whether the 83rd section of the 14 *Geo. 3*, c. 78, is of universal application, or whether it is to be limited to houses and buildings standing within the limit of what is commonly called the metropolitan district.

This 83rd section is not re-enacted as an integral part of the more recent Metropolitan Building Acts, but whereas those Acts repeal the former Act, they except and take out of the operation of that repeal certain sections of the previous Act, and among them the 83rd. That 83rd section therefore remains in all its integrity by virtue of that Act. This is material, because power is given by the Metropolitan Building Acts to apply them to other districts than the metropolitan district—a power which, so far as I am aware, has not been exercised with regard to the district in which this house is situated;—and consequently, where a house falls within the description of a house within the meaning of the statute 14 *Geo. 3*, c. 78, it must be by force of that particular enactment taken by itself.

The construction, then, of the statute of the 14 *Geo. 3*, must be considered.

A preamble affixed to the whole statute limits its applicability within certain local boundaries, and the sections which precede the 83rd almost all contain enactments, carefully worded, to extend only to the districts within the limits defined in the preamble.

But when we approach the 83rd section, we find, in the first place, that the enactment therein contained is heralded by a particular preamble of its own, which
recites

recites a general and universal evil as being the occasion of its being passed. We should be prepared, therefore, to infer, from the statement in that preamble of a general evil which the legislature was desirous to redress, this consequence, viz., that the enactment would, in fact, be co-extensive with the evil stated to have been intended to be redressed; and, in point of fact, that general inference is confirmed by the language of the enactment itself, which is in itself general, and does not contain the words, "within the limits aforesaid;" words which were evidently omitted, and omitted designedly.

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In my judgment, therefore, this particular section is intended to be of general and universal application; nor does it lose its universality because it does not happen to contain the words found in the 84th section, "whether within the limits aforesaid or elsewhere, within the kingdom of *Great Britain*," words redundant and pleonastic, but the insertion of which in the 84th section and the non-insertion of which in the 83rd section furnished ground for one portion of Mr. *Holl's* argument. This conclusion, however, I need not labour, settled as I think it has, in effect, been by the case of *Filliter v. Phippard* (a). And having arrived at the conclusion that the 83rd section of the Act of 14 *Geo. 3*, c. 78, applies to the present case, it follows that I must hold the insurance money upon this particular house applicable, for the benefit of the lessor, to the purpose of reinstating the premises.

But there still remains another and a somewhat difficult question, what is to be done with reference to the insurance moneys paid in respect of fixtures.

The

(a) 11 Q. B. 347.

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The demise of this public house to the lessee was accompanied by a covenant, on the part of the latter, that he would leave upon the premises the fixtures put up by him during the term. The covenant would relate only to those fixtures which might be found upon the premises upon the determination of the term. The term is so created as to determine either by expiration of time or by a particular event, namely the bankruptcy of the lessee. The facts are these; viz., that, pending the lease, the tenant not only insured in the manner to which I have already adverted, but he effected a separate and distinct insurance upon the fixtures. A fire took place whilst the lease was subsisting, and the fixtures then upon the premises were destroyed.

The act of parliament which we have to construe only applies to insurance money and losses with respect to houses and buildings, and the extent of these words, "houses and buildings" may be in some measure collected from the rest of the section, which gives to the insurers the right, and puts them under the obligation, of applying the money in the "rebuilding, reinstating or repairing" of "houses or other buildings." The question, therefore, comes to this: when this fire happened were the fixtures in such a state in the eye of the law, as that, if the lessor had made a conveyance of the freehold and the deed had used only such parcels as these, "all those houses and buildings," the fixtures in question would have passed under that conveyance.

These fixtures were admittedly trade fixtures and would, therefore, by the ordinary rule have been removable by the tenant at the time when the fire took place. The only mode in which the right to remove them could have

have been affected was by the operation of the covenant of the tenant himself, who had covenanted to deliver up the premises with the fixtures upon the determination of the lease. The lessor, therefore, had a contingent future right, which would arise to him by virtue of present contract, to the possession of these fixtures; and, inasmuch as the ownership of the fixtures, at the time when the event happened which gave rise to the intervention of the power contained in the statute, remained in the lessee, the right of the lessor at that time was a personal right depending upon contract and not a real right depending upon ownership.

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In my judgment, therefore, if, at the moment before the destruction took place, the lessor had made a conveyance of the house, the fixtures in question would not have passed as being a member thereof or appurtenant thereto; and that being so, I think that this insurance money does not fall within the operation of the 83rd section, but has constantly remained the personal property of the lessee, and therefore passed to the assignees.



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The language of the orders of the Court of Bankruptcy must be construed with reference to the settled rules of the Court; and it being the settled practice of the Court, that where a security consists of an equitable mortgage, and the mortgagee after a bankruptcy presents a petition for the realisation of the security, he is not entitled to any interest subsequent to the date of the fiat:—*Held*, that where

securities by way of equitable mortgage comprised joint property of bankrupt partners, separate property of one partner, and property of a stranger, and the mortgagees being joint and separate creditors elected to prove against the separate estates, an order made on their petition and directing an account of principal and interest due to them without express limitation of the calculation of the interest to interest due at the date of the fiat, did not entitle them to a calculation of, or to retain out of the proceeds of the securities, interest subsequent to the date of the fiat.

Dividends paid upon an erroneous principle ordered to be refunded after a considerable lapse of time and change of circumstances.

Ex parte SIR JOHN WILLIAM LUBBOCK, Bart.

In the Matter of SAMUEL FLOOD and HARRY BUCKLAND LOTT, Bankrupts.

THIS was an appeal by Sir *John William Lubbock*, Bart., the surviving partner in a firm of bankers, against an order made on the 17th of *April*, 1863, by Mr. *Biggs Andrews*, the Commissioner of the Court of Bankruptcy for the *Exeter* district, whereby the Appellant was ordered in effect to refund to the assignees of the bankrupts a sum of money which had been paid out of the estates of the bankrupts in respect of interest accrued due subsequent to the date of the fiat—*November*, 1847—on certain equitable securities held by the Appellant and his late partners.

The facts of the case were exceedingly complicated, but for the purposes of this report the following short statement of them is sufficient:—

On *April* 13th, 1849, the Appellant's firm presented a petition in bankruptcy, setting forth their securities, which were by deposit of title deeds of estates some of which constituted joint estate, others separate estate of one of the partners, and others property of a surety, and claiming to be creditors of the bankrupts "under and by virtue

virtue and upon the security of the before-mentioned deeds, securities and documents so deposited with the Petitioners, and of the hereditaments, &c., respectively comprised therein, for the sum of 7,643*l.* 13*s.* for principal and interest at the rate of five per cent. per annum, calculated to the 31st day of *December*, 1848, exclusive of subsequent interest thereon;" and praying (amongst other things) for a declaration that the Petitioners were equitable mortgagees of the several estates, messuages, lands, tenements, hereditaments, &c., comprised in the several deeds and securities so deposited; for an account of what was due from the bankrupts to the Petitioners for principal and interest upon and by virtue of the said several securities; for a sale, and for payment out of the moneys which should arise from such sale and out of the rents and profits of the said hereditaments of the costs of the sale in the first place, and for the application of the surplus of the sale moneys in payment to the Petitioners of the said sum of 7,643*l.* 13*s.* and subsequent interest; but if the same should not be sufficient to satisfy and pay the said sum of 7,643*l.* 13*s.* and subsequent interest, then for liberty to the Petitioners to make such proof for the remainder of the said sum of 7,643*l.* 13*s.* and subsequent interest under the fiat against the joint estate or the separate estates of the bankrupts as the Petitioners might be advised or might be able to make.

An order was made upon this petition on the 6th of *August*, 1849, by the Chief Judge Sir *J. L. Knight Bruce*, whereby (amongst other things) it was declared "that the Petitioners were equitable mortgagees of certain messuages, &c., set forth in the schedule thereto annexed." And it was referred to the Commissioner to take "an account of the principal and interest due to the Petitioners in respect of their said securities;" and the hereditaments

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hereditaments were directed to be sold, and the moneys applied, after payment of costs and expenses, "in payment to the Petitioners of what should be found due to them as aforesaid," and the surplus, if any, to the official assignee; and after providing for the case of the moneys not being sufficient to pay to the Petitioners "the amount of what should be so found due to them," and in that event giving the Petitioners liberty to go in under the fiat and prove for the deficiency, and directing them to be admitted as creditors thereunder for what they should so prove, with a right to receive dividends rateably with the other creditors, the petition was ordered to stand over in all other respects, with liberty to the parties to apply, touching the matters in question, as they might be advised.

Under the reference to him contained in this order, the Commissioner, in *June*, 1850, found that the sum of 7,179*l.* 18*s.* 6*d.* was due to the Appellant's firm by virtue of the securities set forth in the schedule annexed to the order for principal and interest, "calculated to the date of the said fiat, together with a further sum of 834*l.* 1*s.* 6*d.* for interest thereon, calculated to the 31st of *May*, 1850, making together the sum of 8,014*l.*, and not including interest accruing and to accrue due subsequent to such last-mentioned date."

The Appellant's firm had in the first instance entered a claim against the joint estate of the bankrupts, but afterwards (in *August*, 1851) by the leave of the Court they withdrew this claim and in 1856 and 1857 proved against the separate estates of the bankrupts, and received dividends under such proofs. The portions of the property not forming part of either of the estates against which the proofs were made were subsequently sold and the proceeds paid to the Appellant's firm, who, by means
of

of these payments and by the dividends paid on their proofs, had received altogether 5,854*l.* 16*s.* 3*d.* If the accounts were to be taken on the principle of not allowing even as against the securities any interest beyond the date of the bankruptcy, this amount was in excess of that due by 416*l.* 11*s.* 6*d.*, and the Commissioner ordered the Appellant to refund that amount.

Mr. *Daniel* and Mr. *De Gex* for the Appellant.

There is no such universal rule as that interest cannot as against a security be allowed beyond the bankruptcy; *Ex parte Ramsbottom* (a). Such a rule would contravene the well-settled principle that a security for a debt, part of which is provable and part not, may be applied by the holder of it to the latter part; *Ex parte Harvard* (b); *Ex parte Arkley* (c); *Ex parte Johnson* (d). In this case the dispute is settled by the terms of the order which directs the computation of interest without restriction. If, when the Court made the order of 1849, it had intended to restrict the right of the then Petitioners in respect of interest to interest due at the date of the fiat, it would have so expressed its order, as was done in the cases of *Ex parte Wardell* (e), and *Ex parte Hercy* (f). The restriction cannot on any sound principle of construction be implied, and, regard being had as well to the frame of the petition on which the order was made as to the terms of the order itself, the question must be regarded

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(a) 2 *M. & A.* 79, and see 2 *M. & A.*, App. A.

(b) 1 *Cooke*, B. L. 124.

(c) *Ib.* 126.

(d) 3 *DeG.*, *M. & G.* 218; S. C., *De G.*, *M. & G.* Bcy. App. 179.

In a later case decided on the authority of that above reported, it was ingeniously argued, that the application of this principle ought

to be confined to the state of the account at the date of the adjudication, and that the provable portion of the debt could not be afterwards increased. See *Re Savin*, L. R., 7 Ch. Ap. 760.

(e) 1 *Cooke*, B. L. 181; 2 *M. & A.*, App. A.

(f) *Ib.*

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regarded as *res judicata*. At all events as against our securities on the joint estate and on the estate of the surety, we may, notwithstanding our proof, apply those securities towards payment of all that is due to us (*Ex parte Shepherd, In re Plummer (a)*; *Ex parte Peacock (b)*), including therefore interest up to the date of payment; and as we cannot prove for interest subsequent to the date of the fiat, we have a right to apply our securities in discharge of that part of the amount due to us for which we cannot prove, viz.:—interest accrued due subsequently to the fiat, and to apply the dividends which we have received to that part of our debt which we can prove. Even if the dividends had been paid to us not according to the course of bankruptcy practice, which we deny, still, as we really lose part of the interest to which in the Court of Chancery we should without doubt be held entitled, the Court will not at this distance of time, and after the death of one of the Appellant's firm and the adjustment of accounts with his estate on the footing of the order, direct the Appellant to refund money paid to his firm under and according to the Court's own order; *Ex parte Soper (c)*; *Ex parte Wilson (d)*. In *Ex parte Sanderson (e)* the Court refused in such circumstances even to rectify a miscalculation, though there was no question of refunding, no dividend having been declared.

Mr. Bacon and Mr. Bevir for the Respondents, the assignees, were not heard.

The LORD CHANCELLOR.


The Appellant's firm had at the date of the bankruptcy due to them from the two bankrupts, who were partners

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(a) 2 M., D. & De G. 204;
1 Ph. 56.
(b) 2 Gl. & J. 27.

(c) 2 M. & A. 55.
(d) 1 M., D. & De G. 586.
(e) 8 De G., M. & G. 849.

as bankers, a debt amounting to upwards of 7,000*l.*, and in respect of that debt they held several securities as equitable mortgagees. The securities consisted, first, of property belonging to the bankrupts jointly; secondly, of property belonging to one of the bankrupts, Mr. *Flood*, severally; and thirdly, of deeds relating to property belonging to a Mr. *Miles*, who in this respect may be assumed to have acted as a surety.

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Nothing can be better settled by the practice of the Court for the last sixty years than that where securities consist of an equitable mortgage, and the mortgagee, after a bankruptcy, presents a petition for the realisation of that security, he is not entitled to any interest subsequent to the date of the fiat. Again: The language of orders made by the Court must be construed with reference to the settled rules of the Court. Apply these two observations to the order made by the Court in this matter in *August*, 1849, and the construction of which is in reality all that we are now concerned with.—[His Lordship here referred to the terms of the order in question, and proceeded thus:—]I cannot assume that the Court in using the language which it did intended to depart from the ordinary rule, nor are any special circumstances brought before the notice of the Court which can be used for the purpose of setting aside that ordinary rule.

Under the direction, therefore, contained in the order, to compute principal and interest, interest is to be computed in conformity with the ordinary rule of the Court, which must apply where there is no direction to the contrary, namely, that interest is to stop at the date of the fiat. That being so, the form of the order settles the whole question as to the security, giving, as it does, the whole proceeds over to the assignee after payment of costs, principal and interest so computed. The finding

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of the Commissioner in *June*, 1850, so far as it had reference to interest accrued due subsequent to the date of the fiat, was arrived at in error, and was not justified by the order. An argument was founded on the circumstance of the Petitioner's firm having by leave of the Court withdrawn their claim against the joint estate, and elected to prove against the separate estates. But that argument only applies to 6,000*l.* which was proved against the separate estate of *Lott*, leaving the Petitioner entitled to the benefit of the order of *August*, 1849, as against the separate estate of *Flood*, to the extent of the dividends, which he has received from that estate under the order. The claim is therefore simply to retain interest subsequent to the date of the fiat, although the order of the Court is required for the purposes of proof.

The order under appeal is right, and the appeal must be dismissed with costs.

1863.

May 30.
July 18.
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Ex parte MATTHEW BOULTON DAVIS.

In the Matter of JOHN HARRIS, a Bankrupt.

THIS was an appeal by *Matthew Boulton Davis*, the executor of *Richard Francis Davis*, deceased, from a decision of Mr. Commissioner *Hill*, rejecting a proof against the estate of the bankrupt *John Harris*, who was adjudged bankrupt in 1863, on the ground of the existence of a partnership between the Appellant's testator, who is hereinafter for the sake of brevity called the testator, and the bankrupt.

There was no person who claimed to be a joint creditor of the testator and the bankrupt, and the question was, in substance, whether or not as between themselves the testator and the bankrupt were partners. This question depended upon the conclusion to be drawn from an agreement between the parties, which was expressed in the shape of recitals in the defeasance to a bond, dated the 7th of *January*, 1855.

These eight years nominate:
B. was to

make certain advances to *A.* for the purpose of the business and become surety for him to a certain company: *A.* was to give *B.* promissory notes for his advances and any sums he might pay as surety, and to carry on the business in partnership with *B.*'s nominee for twenty-one years on certain specified terms: the profits of the business were to be for the first eight years applied in paying *A.* 100*l.* a-year, and then in paying *B.* his advances with interest; and the residue was to be divided between *A.* and *B.*'s nominee in certain specified proportions, and losses were to be borne in the same proportions. The agreement gave *B.* a right to see the accounts relating to the business, and contained other special clauses under which *B.* might at any time within the eight years have nominated himself as a partner. Before the eight years had elapsed, and before any nomination had been made by *B.*, *A.* became bankrupt, being indebted to *B.* for advances. There being no person who claimed to be a joint creditor of *A.* and *B.*:—*Held*, that *B.*'s executor was entitled to prove against *A.*'s estate for the advances, the agreement not having constituted *A.* and *B.* partners as between themselves.

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These were to the effect that the bankrupt had agreed to take a lease of certain premises belonging to the *Blaenavon Iron and Coal Company* for twenty-one years, and to carry on there the business of a general shopkeeper, in the name of *John Harris & Co.*; that he had proposed to the company that they should accept his drafts upon them in the above names, with which he was to pay for goods, and that the company had agreed so to do on having a sufficient surety; that the bankrupt had proposed to the testator that the latter should advance to the bankrupt capital to assist him in providing goods and furniture, such advances not to exceed 1,200*l.*; that the bankrupt, as a consideration to induce the testator to become such surety, had further proposed to him that the business should be carried on by the bankrupt and such other person or persons as the testator should, at any time within the space of eight years from the date of the bond, nominate or appoint; and that the bankrupt and the said nominee or nominees of the testator as aforesaid should be partners in the business on the terms thereafter contained; that the bankrupt had further proposed, as a further consideration, that the bankrupt should deliver to the testator, if required by him so to do, the promissory notes of the bankrupt, payable to the testator on demand, for the amounts of the drafts of the bankrupt on the company, and for the amounts of the advances made by the testator, such notes to be a security for the payment by the bankrupt of the said drafts, and for the repayment to the testator, his executors or administrators, by the bankrupt, his executors or administrators, of the advances of the testator; that the testator had consented to the proposals and had become surety as aforesaid, and that the company had agreed to grant a lease of the premises and to accept the drafts; that it had been stipulated and agreed between the bankrupt and the testator that the bankrupt, his executors and administrators, should during

during the term carry on the business for the benefit of himself and the person or persons to be nominated by the testator as co-partners with the bankrupt upon the terms after mentioned ; that the bankrupt, his executors or administrators, would immediately upon the nomination by the testator, his executors or administrators, of a person or persons to be a partner or partners in the said business, admit and receive the said nominee or nominees of the testator, his executors or administrators, to be a partner or partners in the said business ; that the said partnership should commence and take effect immediately on the nomination in writing of such person or persons as aforesaid by the testator, his executors or administrators ; that the said partnership should remain and continue for the term of twenty-one years from the date of the bond ; that the clear profits should be applied in the following manner, viz.:—100*l.* per annum during the period of eight years from the date thereof should be paid to the bankrupt for the services of himself and his wife, the bankrupt should have board and lodging for himself and family, and the remainder of the said profits should be applied annually in or towards paying to the testator, his executors or administrators, the amount that should be from time to time due to him for his advances to the bankrupt or the said co-partnership, with interest at 5*l.* per cent. ; and after full payment to the testator the stock-in-trade and profits of the business were to belong to the said co-partners in the following proportions, viz.:—One-third to the bankrupt, his executors or administrators, and the remaining two-thirds to the nominee or nominees of the testator, his executors or administrators, and all losses, damages and expenses to be incurred or occasioned in or about the carrying on of the said business were to be borne by the said co-partners in the same proportions as the profits of the said business were to be divided between them ; that the bankrupt,

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until such nomination by the testator as aforesaid, should provide and keep books, such books to be always kept in the several counting-houses or other places where the business should be usually carried on, and where the testator, his executors or administrators, and each and every of the partners, should, at all convenient times in the day, have free access to them; that moneys and bills of exchange should be deposited or lodged with the cashier for the time being of the company, and were to be applied in taking up the drafts of the bankrupt and for the purposes of the business, in reimbursing the testator, and the paying the 100*l.* a-year to the bankrupt; that after payment of the advances by the testator, with interest as aforesaid, the profits of the business should be divided at the end of every year between the said partners in the proportions aforesaid; that the bankrupt should not, either before the nomination by the testator, his executors or administrators, of a person or persons to be a partner or partners in the said business, or during the continuance of the said co-partnership, except with the permission in writing first obtained of the testator, his executors or administrators, or the said co-partner or co-partners, carry on any business on his own account or any other business; that the bankrupt should use his best endeavours to promote the success of the co-partnership business thereby agreed to be established; that he should, until such nomination as aforesaid, and after such nomination of the said co-partners, every year during the continuance of the said co-partnership, make out accounts of all moneys received and paid by and on account of the said co-partnership, and of all gains or losses which should have accrued or been sustained in the said business, and of all debts, and of all other the joint stock or effects then belonging thereto, so that the precise state of the business might be clearly ascertained; the estimate to be signed or subscribed by each and every

every of the said partners ; that previously to ascertaining the state and condition of the said joint trade in manner last mentioned, no division of the profits of the preceding year was to be made ; that the bankrupt, until the nomination of such person or persons as aforesaid by the testator, his executors or administrators, and after such nomination of the said partners, was to give to the testator, his executors or administrators, his promissory note, or their joint promissory note, as the case might be, payable on demand, for the amount of each and every draft so to be made by the bankrupt, or by the bankrupt for himself and partner or partners, or by his said partner or partners, on the company ; and also a like promissory note for every sum of money so to be advanced by the testator as thereinbefore mentioned ; that the bankrupt, his executors or administrators, was to stand possessed of the term as a trustee for the purposes of the said co-partnership, and should not, without the consent in writing of the testator, his executors or administrators, or of the said partner or partners, give notice to the company to determine the lease ; that if at any time during the said co-partnership, and after the determination thereof, any dispute should arise of and concerning the true construction and meaning of the document now in statement, it should be referred to arbitration in manner therein mentioned ; that the person or persons to be nominated by the testator, his executors or administrators, as partner or partners in the said business, might at any time thereafter sell and dispose of his or her share or shares in the said business to any person or persons, who should thereupon become a partner or partners with the bankrupt in the said business ; that if the bankrupt were to die in the lifetime of his then wife, his share in the business was to devolve upon and be enjoyed by her for the benefit of either herself alone, or if she should have children, for the benefit of herself and children,

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children, but the management of the business was to be vested in such person or persons as the said partner or partners entitled to the largest share in the said business should direct; that if (as in fact happened) the wife died in his lifetime, his share in the business should on his death cease, and the partnership thereby covenanted to be entered into by him should, so far as related to him, his executors or administrators, be at an end, but his executors or administrators should be entitled to be paid by the surviving or continuing partner or partners such a sum of money for the share of the bankrupt as should be fixed by arbitration; that, subject to the last proviso, the bankrupt should be at liberty to sell his share, provided that before such sale he should have given a notice in writing of his intention to each of the said partners, and in such notice should offer to sell his said share to the other or others of his said partners at a specified price; that if the bankrupt should die before the nomination by the testator, his executors or administrators, of a person or persons to be a partner or partners in the said business, the interest of the bankrupt, his executors or administrators, in the said business and the capital and stock-in-trade should cease; that if the bankrupt died in the lifetime of his wife, his one-third was to devolve on her, and the testator, his executors or administrators, was to be at liberty to nominate a person or persons to carry on the business with the wife for her benefit as to one-third of the business, and for the benefit of such nominee or nominees as to the other two-thirds, subject as aforesaid; that if the death of the bankrupt, previous to the nomination by the testator, his executors or administrators, of a person or persons to be a partner or partners as aforesaid, should happen after the death of his then present wife, the testator, his executors or administrators, might nominate a person or persons to carry on the said business for the benefit of such nominee
or

or nominees solely, but subject to the conditions and provisions thereinbefore contained.

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Mr. *W. M. James* and Mr. *Bagshawe* for the Appellant.

There was no present partnership between the parties, and no partnership at all was intended to be created until the testator exercised his power of nomination. Even if there were a present partnership between the parties the testator's estate was a creditor of the bankrupt for advances made by the testator to the bankrupt, and as such entitled to prove against his estate for the amount of the debt, where, as here, there is no person claiming to be a joint creditor of both the testator and the bankrupt.

They referred to *Waugh v. Carver (a)*, and *Cox v. Hickman (b)*.

Mr. *Lindley* for the Respondents, the assignees of the bankrupt's estate, in support of the judgment in the Court below.

The Commissioner's decision is right. On the true construction of the agreement between the parties they were present partners, a construction borne out if need were by their course of dealing. The bond and its defeasance were mere attempts to disguise the actual existence of a present partnership between the parties, and the present is a mere attempt to prove an item in an unsettled partnership account. Even if there were no present partnership between them, the moneys sought to be

(a) 2 H. Bl. 235.

(b) 8 H. L. Cas. 268.

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be proved for were by the agreement itself to be paid out of the business, and not by the bankrupt personally.

At the conclusion of his argument the Lord Chancellor directed the matter to stand over in order that his Lordship might satisfy himself, by an examination of the proceedings in the bankruptcy, on the question whether, independently of the bond and its defeasance, a present partnership had been created between the parties by their course of dealing.

The LORD CHANCELLOR.

July 18. Mr. *Richard Francis Davis* was the manager or managing director of an iron and coal company in *Wales*, called the *Blaenavon Iron and Coal Company*. It occurred to him that it would be a profitable speculation to establish general shops in three localities in *Wales*, for the purpose of supplying the goods that would be required by the miners and other persons employed by the company, and he accordingly made an arrangement with the bankrupt *John Harris*, who had married his sister, that *John Harris* should carry on that business.

The terms of the arrangement are embodied in a certain bond dated the 7th of *January*, 1855, which is an ingenious piece of mechanism, and the provisions of which are very peculiar. The terms to which I refer are to the following effect:—[His Lordship here referred to the terms of the defeasance to the bond in question and proceeded thus:—]The result of the arrangement was, that until the partnership should be created by *Davis*, there might be, if there were sufficient profits for
 the

the purpose, a sum of money, the division of which would be suspended until the formation of that partnership.

The learned Commissioner appears to have considered that the terms of the agreement amounted to a present partnership.

In my judgment that is not the effect of the agreement. No partnership can arise until the person to become partner has been nominated by *Davis*; and there is not, in my judgment, any present contract of partnership between *Harris* and *Davis*. The criterion that there is not, may be taken to be this, that had *Harris* become bankrupt before *Davis* had nominated a partner, any money reserved as profits to be hereafter distributed between the partners when the partnership was formed would, by the operation of that bankruptcy, be the property of *Harris*, the power of creating the partnership being put an end to by the event of such bankruptcy. All the provisions of the bond on which the learned Commissioner has relied as indicating the creation of a present partnership, ought, in my judgment, to be construed with reference to the general intent of the bond, as provisions which shall become operative only subject to the condition and after the nomination of a partner by *Davis*, an event which never took place. The bankruptcy of *Harris* took place before there was any nomination of a partner, and there was therefore no contract of partnership, for there was no individual to answer the description and to fulfil the capacity of partner with *Harris*. I cannot hold that the power of nominating a partner given to an individual constitutes that individual himself a partner. It is true that the arrangements which are contained in the deed would probably absorb the whole of the profits before the possibility of
any

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any division between the co-partners. But that is the result of the contract between *Harris* and *Davis*, which I think is well constituted by the bond, and is not at all affected by, or merged in, the power that *Davis* reserved to himself of hereafter creating, if he should think fit, a partnership between some nominee of his own and *Harris*.

I must, therefore, take the only subsisting contract between *Harris* and *Davis*, at the time of *Harris's* bankruptcy, to have been the contract of debtor and creditor in respect of the advances made by *Davis* to *Harris*, and the payments made by *Davis* on account of *Harris*; and, consequently, I think the proof ought to have been admitted, subject to any adjustment of the figures which may be required.

It has been suggested that *Harris* was in reality only the agent of *Davis*, but I do not think there is any foundation in fact for that suggestion. Mr. *Harris* had a substantive and independent interest. In truth, he would be entitled to the whole of the profits after the payment of Mr. *Davis*, in the event of no partnership (as has been the fact) having ever been created by *Davis* nominating a person to become a partner.

I must, therefore, reverse the order under appeal, and declare that the executor is entitled to prove in respect of the debt due from *Harris* to his testator at the time of the bankruptcy.

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Ex parte JOHN COLLINGE, SAMUEL FOX,
HENRY BAGSHAW, MATTHEW HENRY
HABERSHON, and DAVID DAVY.

In the Matter of HARRY HOLDSWORTH, a Bank-
rupt.

Nov. 4.
Before The
Lord
Chancellor
LORD
WESTBURY.

THIS was the appeal of *John Collinge, Samuel Fox, Henry Bagshaw, Matthew Henry Habershon and David Davy*, trustees of a deed of assignment of the 14th of *November, 1862*, from the refusal by Mr. Commissioner *West* to admit a proof tendered by them against the estate of the bankrupt *Harry Holdsworth*.

The Court refused to relax the rule in bankruptcy that on the bankruptcy of a firm there cannot be a proof on behalf of the estate of one partner against the estate of another until all the joint debts are paid, although, in the circumstances of the case and having regard to the amounts of the estates, the result of relaxing the rule would have been to increase the proving estate to such an extent that it would have yielded a larger surplus to the joint estate than would arise from the estate sought to be proved against if the rule were observed not, and the proof excluded.

The question was brought before the Court on a special case, and, so far as it is necessary to refer to the facts, they were as follows:—

Major *George Elliot Ashburner* became a partner with the bankrupt in 1861. The partnership was dissolved in *September, 1862*, under an arrangement by which the bankrupt and *William Holdsworth* gave the major a bond to secure 10,000*l.* and interest, and the major transferred and released to the bankrupt all his estate and interest in the partnership. The bankrupt and *William Holdsworth* covenanted within nine months to discharge the joint debts of the firm.

On the 14th of *October Harry Holdsworth* was adjudged bankrupt, there being at that time unsatisfied several large joint creditors of the dissolved firm.

In *November, 1862*, a meeting of creditors was held—

The rule in question enures for the benefit of the separate creditors as well as of the joint creditors.

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not, however, in pursuance of any statutory powers—whereat certain resolutions were passed, which resulted in the execution by Major *Ashburner*, on the 14th of *November*, 1862, of a deed of that date, which was expressed to be made between the bankrupt of the first part, Major *Ashburner* of the second part, the Appellants of the third part, and the several other persons, being creditors in their own right or in co-partnership of the bankrupt and Major *Ashburner*, or of one of them, whose names were thereto affixed or set, and all other the creditors of the bankrupt and Major *Ashburner*, or either of them, of the fourth part. By this deed Major *Ashburner* assigned to the Appellants all his real and personal estate and effects upon the trusts thereafter declared; and it was declared that the Appellants should stand possessed of the effects of the bankrupt and of the property thereby assigned by Major *Ashburner* for the benefit of the creditors of the bankrupt and Major *Ashburner* in a like course of administration in all respects as if the existing bankruptcy had been annulled, and a joint adjudication in bankruptcy had taken place against the bankrupt and Major *Ashburner*, and as if the estate and effects of the bankrupt and the property assured by the deed had been vested in the Appellants as the assignees under such joint adjudication.

The deed reserved to the Appellants and to the parties of the fourth part all rights and privileges to which they would be entitled by virtue of the law and practice in bankruptcy, and contained a release to, and an indemnity in favour of, Major *Ashburner* by the Appellants and the parties of the fourth part in respect of their respective debts.

This deed was registered under the 194th section of the Bankruptcy Act, 1861.

On

On the 17th of *November*, 1862, a meeting of the bankrupt's creditors was held, whereat the Appellants were chosen assignees, and a resolution, which was afterwards confirmed by the Court, was passed with reference to the deed of the 14th *November*, 1862, that there should be reserved to the creditors of the bankrupt and Major *Ashburner* all rights and privileges to which they were respectively entitled under or by virtue of the law or practice in bankruptcy.

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In working out the administration of the estates of the bankrupt and Major *Ashburner* under the above circumstances, and in the events which happened, there was but one creditor, viz., the *Sheffield and Rotherham Banking Company*, who claimed to prove against the separate estate of Major *Ashburner*, and the amount of their claim was about 1,000*l.* The joint estate was insolvent; but the separate estate of the bankrupt showed a surplus of 5,937*l.* 14*s.* 10*d.*, if the debt, the right on the part of the Appellants to prove which formed the subject of the present appeal, was excluded.

The Appellants, in their capacity of trustees of the deed of the 14th of *November*, 1862, claimed to prove against the bankrupt's separate estate upon the bond of *September*, 1862, and also upon certain cheques and promissory notes given by him on the occasion of the dissolution of partnership for interest and share of profits. The amount of the proof so tendered was upwards of 11,000*l.*

Mr. Commissioner *West* decided against the Appellants' right to prove, and it was this decision which was under appeal.

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Mr. *Bacon* and Mr. *Swanston* for the Appellants.

No doubt the rule, as laid down by Lord *Eldon* in *Ex parte Sillitoe* (a), that "a partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors, shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself," is against the admission of this proof. But that rule, as Lord *Eldon* goes on to observe, is subject to one exception, viz., in the case where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership. That exception Lord *Eldon* speaks of as manifestly founded in justice. On not dissimilar grounds we now press for the admission of this proof, even if its admission go to make another exception to the rule. The rule exists solely for the benefit of the joint creditors, and in order that the surplus which may be coming to them from any separate estate may not be intercepted or diminished by a proof on that separate estate on behalf of a partner or of his separate creditors. But the admission of the proof in the present case will not only not damnify the joint creditors, but it will positively benefit them. If the proof be admitted, it will, it is true, absorb the present surplus of the bankrupt's separate estate, and so prevent it from falling into the joint estate; but it will, on the other hand, bring into the separate estate of Major *Ashburner* a large amount which, after satisfying the claim of the *Sheffield and Rotherham Bank*, will leave to go over to the joint estate a larger surplus than would, if it had not been intercepted, have come over from the bankrupt's estate. To apply the rule here would be to work injustice to the joint

(a) 1 *GL & J.* 374, 382.

joint creditors, and the case is one for an exception to the rule.

Mr. *Giffard* and Mr. *Hamilton Humphreys*, for the Respondents, were not called upon.

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The LORD CHANCELLOR.

I cannot allow this proof to be entered.

The rule is, that a partner cannot prove for a debt so as to compete with the joint creditors, who are, in fact, his own creditors. Another rule is, that no joint creditor can make a claim against, or be paid out of, the separate estate until the whole of the separate creditors have been paid. It is a mistake to suppose, as has been argued, that the objection to a proof against the separate estate of a partner, on behalf of another partner or his estate, can be only sustained by joint creditors or for their benefit. The rule enures for the benefit of separate creditors also.

But it having been erroneously supposed that the objection lay in the mouths of the joint creditors only, it was thought that the objection might be met by the ingenious argument which has been here resorted to. The rule, however, remains, that so long as there are joint debts, a partner who is liable for those joint debts shall not make any claim against the separate estate, because, by possibility, he may come into competition with his own creditors. That principle is the foundation of the rule, and this ingenious argument does not touch upon its ground in the slightest degree.

The fact that after the bankruptcy an assignment was made of the separate estate of Major *Ashburner*, (including this debt due from the bankrupt,) for the benefit

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of

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of the joint creditors—probably so far converting his separate assets into joint assets—is of no avail, unless the joint creditors are willing to accept that assignment as payment in full and to release the joint liability. If that were done, and there were no longer any joint liability to which Major *Ashburner* was exposed as partner, there would remain no objection to his proof against the separate estate.

The resolutions of the creditors are out of the question, unless, as is not pretended, the meeting was held under some statutory powers, whereunder the resolutions would be binding upon all the creditors.

In my judgment, therefore, the learned Commissioner came to a right conclusion, and this appeal must be dismissed. I dismiss it, however, without costs, and the deposit may be returned.

1864.

March 16.
April 20.
Before The
Lord
Chancellor
LORD
WESTBURY.

Ex parte WILLIAM CANWELL.

In the Matter of THOMAS VAUGHAN.

THIS was the appeal of *William Canwell*, the official liquidator of the *Waterloo Life, Education, Casualty, Self-Relief Assurance Company*, from the refusal by Mr. Commissioner *Goulburn* to adjudicate the Respondent *Thomas Vaughan* a bankrupt on the Appellant's petition. The company was registered in 1851 under the stat. 7 & 8 *Vict.* c. 110, and its deed of settlement was dated in *November*, 1851.

The liability of a contributory under the Companies Act, 1862, s. 75, commences at the date when he enters into the contract under which he becomes a member of the company which is being wound up.

His Honor was of opinion that there was no sufficient petitioning creditor's debt within the meaning of the Bankruptcy Act, 1861, s. 90, the terms of which, so far as they are material, are set out below (a).

The question turned upon the construction of the Companies Act, 1862, s. 75, the terms of which, so far as they are material, are also set out below (b); and it arose in this way:—

The Respondent, who was a non-trader, was an original shareholder in the company, which was being wound up

(a) The Bankruptcy Act, 1861, 24 & 25 *Vict.* c. 134, s. 90. "The debt of the petitioning creditor of any debtor not being a trader . . . must be a debt contracted after the passing of this Act." The Act received the Royal Assent on the 6th of August, 1861.

(b) The Companies Act, 1862, 25 & 26 *Vict.* c. 89, s. 75. "The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing

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up as an unregistered company under the Companies Act, 1862, Part VIII. (a), and upon him, as a contributory, a call was made under an order in the winding-up made in *August*, 1863. This call he neglected to pay, and left the country under circumstances which, it was contended, constituted an act of bankruptcy on his part, if the call constituted a good petitioning creditor's debt within the meaning of the Bankruptcy Act, 1861, s. 90.

The Commissioner held that the debt was contracted after the passing of the Bankruptcy Act, 1861, and the present appeal was from his decision.

The company was registered under the Companies Act, 1862, in *January*, 1863.

Mr. *Giffard* and Mr. *Roxburgh* appeared for the Appellant.

Mr. *W. M. James* and Mr. *De Gex* appeared for the Respondent.

The arguments turned principally upon the language of the sections of the Bankruptcy Act, 1861, and the Companies Act, 1862, already referred to, and their scope appears from the Lord Chancellor's judgment.

Reference was also made to the 80th, 83rd and 89th sections of the Bankruptcy Act, 1861, and to the 11th, 38th,

due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability: and it shall be lawful in the case of a

bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made."

(a) See 31 *Beav.* 586.

38th, 74th, 101st, 102nd, 199th, 200th, 204th sections of the Companies Act, 1862, and also to *Birch's Case* (a); *Robinson's Executor's Case* (b); *Ex parte Nicholas* (c); *Ex parte Mendel, In re Moor's Assignment* (d), and to the terms of the deed of settlement.

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The words of the 204th section of the Companies Act, 1862, so referred to, and which were commented on in the Lord Chancellor's judgment, are set out below (e).

The LORD CHANCELLOR.

I cannot accede to Mr. *Giffard's* ingenious suggestion that the winding-up in this case, being under the eighth part of the Companies Act, 1862, is, by the operation of the concluding words of the 204th section of that Act, exempted from being subject to the 75th section.

The concluding words of the 204th section leave the full operation of the whole of the eighth part as the rule for winding-up, and it is declared, in the 199th section, that all the "provisions of this Act with respect to winding-up shall apply to such company with the following exceptions and additions." Then follow a number of subordinate clauses, which are distinguished partly by numbers and partly by letters, and which constitute the exceptions and additions which are denominated "the following." The words which Mr. *Giffard* desires to import into these exceptions are not found except at a remote portion

(a) 2 *De G. & J.* 10.

(b) 6 *De G., M. & G.* 572, 585.

(c) 2 *De G., M. & G.* 271; *S. C., De G., M. & G. Bcy. App.* 143.

(d) 1 *De G., J. & S.* 330; *supra*, 106.

(e) The Companies Act, 1862. Sect. 204. " . . . but an un-registered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this part of this Act."

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tion at the very end of this eighth part, namely, at the conclusion of the 204th section. I cannot give to the words the operation which he desires to attribute to them.

The winding-up order, therefore, which was made subsequently to the passing of this Act of 1862, must be governed by the operation of this Act and its express provisions.

Among those express provisions is the 75th section, by which it is declared as follows:—[His Lordship read the terms of the section and proceeded thus:]

It is difficult to tell when the liability referred to in this section is to be considered as commencing; but my present impression is, that the legislature must be held to consider it as relating back to the date of the contract; that whereas under this section the commencement of the liability must clearly be held to be a period different from the time of the call being made, and it cannot be the date of the winding-up order, no other date can be assigned for the commencement of such liability than the date of the contract under which the contributory became a member.

In that view of the provisions of the Act of 1862, there would not be in this case a petitioning creditor's debt within the definition or requisition of the 90th section of the Bankruptcy Act, 1861,—there would be no debt contracted by the Respondent after the passing of that Act.

I will, however, reserve my final judgment upon the point

The

The LORD CHANCELLOR.

Upon further consideration, I adhere to the opinion which I expressed at the conclusion of the arguments. The Commissioner's order, therefore, was right, and the appeal must be dismissed.

1864.

Ex parte
CANWELL.

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VAUGHAN.
April 20.

Ex parte ROBERT STEWART.

In the Matter of EDWARD SHELLEY, a Bankrupt.

THIS was the appeal of *Robert Stewart*, one of the registered public officers of the *Stourbridge and Kidderminster Banking Company*, from the dismissal of a petition by Mr. Commissioner *Sanders*.

The *Victoria Silver, Lead and Zinc Company Limited* was a company incorporated and registered under the Joint Stock Companies Act, 1856, without articles of association, and, therefore, subject to the regulations contained in Table B. of the Act.

In *May*, 1862, the bankrupt *Edward Shelley* was the managing director and secretary of the mining company, and on its behalf applied to the bank for a loan of 2,500*l*.

equitable mortgagee incapable of perfecting his title as against the mortgagor and his assignees in bankruptcy by giving notice of the mortgage to the company.

The managing director, who was also the sole secretary of a company registered under the above act, joined with all his co-directors in making an equitable mortgage of their shares to a bank, as a security for an advance to the company. The bank gave no notice to the company. On the bankruptcy of the managing director :—*Held*, that his shares were not in his order and disposition with the consent of the bank as the true owners thereof, but that the bank were entitled to them as mortgagees.

Dec. 17.

Before *The*
Lord
Chancellor
LORD

WESTBURY.

The object of the Joint Stock Companies Act, 1856, s. 19, was that the company itself should not be bound by any trust, and that no notice should have any effect as against the company, but there is nothing in the Act which precludes an equitable mortgage of shares in a company, or renders an

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at interest. The bank acceded to the application, and made the advance upon the security of a joint and several promissory note, signed by the bankrupt and seven other persons, and of the deposit by the makers of the note of the certificates of 300 shares in the company belonging to them. Of the seven makers of the note, other than the bankrupt, six were directors of the company, and they and the bankrupt together constituted the whole body of directors. Of the 300 shares, the certificates of which were deposited with the bank on the occasion of the advance, 105 belonged to the bankrupt.

In *November*, 1862, the bankrupt applied to the bank for a renewal of the note and a further advance of like amount. The bank acceded to the application, the additional security being given of the deposit of the certificates of 230 more shares, of which the bankrupt was the owner of 100, a renewed note signed by the same eight persons as before for the original advance, and a new promissory note signed by the same eight persons for the new advance. The notes were joint and several.

The bank gave no notice to the company of these deposits of shares.

The adjudication took place on the 15th of *July*, 1863.

Subsequently the Appellant presented a petition to the Court praying an account of what was due to the bank, a sale of the shares, and liberty to them to prove for the deficiency.

The Court dismissed the petition on the ground that no sufficient notice of the deposit with the bank had been given to the company to take the shares out of the order and disposition of the bankrupt.

This

This was the order under appeal.

Mr. *Bacon* and Mr. *De Gex*, for the Appellant, having opened the case on his behalf,

The Lord Chancellor called upon

Mr. *Daniel* and Mr. *Little*, who appeared for the Respondents, the assignees, and who argued to the effect stated in the Lord Chancellor's judgment, citing *The Joint Stock Companies Act*, 1856, ss. 19, 23 (a); *Ex parte Boulton* (b); *Ex parte Hennessy* (c); *Thompson v. Speirs* (d).

A reply was not heard.

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(a) These sections are as follows:—

Sect. 19. "No notice of any trust, expressed, or implied, or constructive, shall be entered on the register or receivable by the company; and every person who has accepted any share in a company registered under this Act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him) shall for the purposes of this Act, be deemed to be a shareholder."

Sect. 23. "The register of shareholders commencing from the incorporation of the company, shall be kept at the registered office of the company hereinafter mentioned; except when closed as hereinafter mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meet-

ing may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any shareholder *gratis*, and to the inspection of any other person on payment of one shilling, or such less sum as the company may prescribe for each inspection; and every such shareholder or other person may require a copy of such register, or of any part thereof, on payment of sixpence for every one hundred words required to be copied; if such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues."

(b) 1 *De G. & J.* 163; *S. C.*, *De G. & J. Bcy. App.* 37.

(c) 2 *Dr. & War.* 555.

(d) 13 *Sim.* 469.

1864.

Ex parte
STEWART.
In re
SHELLEY.

The LORD CHANCELLOR.

This case arises as between the Appellant, a purchaser for valuable consideration, on the one hand, and the assignees in bankruptcy of the person who deposited the shares in question with the purchaser on the other.

It is a general rule that an assignee takes the property of a bankrupt subject to the equities which affect it in his hands; and, therefore, as a general rule, he will take it subject to the effect of any contract for valuable consideration entered into before the bankruptcy. The deposit here was by way of equitable mortgage to secure a loan made to the bankrupt anterior to the bankruptcy, which was a contract for valuable consideration. The right of the Appellant, therefore, will follow without the possibility of doubt, unless from some consideration founded upon the peculiar nature of the property.

First of all it has been said, on behalf of the assignees, that the right of the Appellant as purchaser for valuable consideration is met by the provisions of the Bankrupt Law Consolidation Act, 1849, as to reputed ownership, and that to avoid their operation, a person taking a deposit of shares in a company, and having no more than an equitable title, must, for the confirmation of his title, give notice to the persons who may be called the trustees of the property, and to whom application might be made for the purpose of ascertaining of what the bankrupt was possessed.

The words of the statute are, "If any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition any goods or chattels whereof he was reputed owner, or whereof he has taken upon
him

him the sale, alteration or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy."

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According to the construction which has long been put upon this clause, the circumstance of the person having the equitable right not giving notice to the person in whose hands, at law, the property may be considered as resting, is a fact from which permission may be inferred on the part of the true owner, that the property shall remain in the hands of the bankrupt as the reputed owner.

It is apparent that neglect may not be evidence of consent. But it has been held that the neglect by an equitable purchaser or mortgagee to give notice of his security amounts to a sufficient proof of a consent that the bankrupt shall remain the apparent owner.

Then we come to the inquiry whether, in this case, there was that neglect.

First, however, let me dispose of the objection raised by Mr. *Daniel* and Mr. *Little* upon the Joint Stock Companies Act, 1856. Upon the 19th section of that Act they say that no notice of any trust, express, implied or constructive, is allowed to be entered on the register or is receivable by the company; and they therefore argue that it is not in the power of an equitable mortgagee to give any notice because the Act of Parliament forbids the company receiving any such notice.

That argument goes to destroy the power of a shareholder to make any effectual equitable mortgage; but, in point of fact, the purpose of the enactment contained in this

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this 19th section was simply this:—that the title of the shareholders in the books of the company should be kept wholly unincumbered and unaffected by any notice of equitable dealings. It would greatly embarrass the company if the shareholders were permitted to incumber the register with notice of equitable dealings. The company would not know whether to summon to their meetings the persons on the list of shareholders or the persons claiming under these notices. The object, therefore, of the legislature was, that all persons appearing on the register should have a clear title not incumbered by the embarrassments which must arise if the legal title were permitted to be affected by notice; or, in other words, that the company itself should not be bound by any trust, and that no notice should have any effect as against the company. I do not think it possible to carry the meaning of the enactment beyond that, nor does the 23rd section carry the meaning beyond this:—that the legislature will not permit the title of the shareholder to be incumbered with notice of any trust.

That being so, the case is reduced to an inquiry of fact, namely, whether the notice involved in the transaction itself was or was not such a notice as rendered it impossible to say that the bank did permit the shareholder to continue the apparent owner—impossible, in the face of the knowledge which resulted from the transaction itself, to impute to the bank any neglect to give notice. For the consent of the equitable mortgagee to the person with whom he deals continuing the apparent owner is inferred only from the neglect of the former to give notice. Is there, then, to be imputed to the bank any such neglect? Could the bank have rendered the transaction more patent than the transaction rendered itself to the persons to whom notice should have been given?

It

It is material to observe that the case is free from the effect of any particular provisions contained in articles of association. There is nothing which prescribes that notice is to be given in any particular form or manner, at any particular place or to any particular person.

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Then what do we find upon the facts here?

Here is a company actually constituted with seven directors, one of whom is also the manager, being at the same time the secretary, and who afterwards becomes bankrupt. It is considered desirable to have an advance of money for the purposes of the company. Accordingly the directors apply to the bank for a loan, and the seven directors individually arrange with one another to deposit the certificates of their several shares with the bank for the moneys which are at the time advanced and lent by the bank. The secretary is a party to the transaction, and has a complete knowledge of it. Every one of the directors is a party to it, and has complete knowledge of it. It is impossible to say that this was a matter not authorized by the constitution of the partnership and not having direct reference to the affairs of the company. In a word, it was a company transaction. Could it be possible for the bank to have affected any mind in a more explicit manner than the transaction itself affected the minds of the directors?

Reference has been made to the judgment of the Lord Justice *Turner* in *Ex parte Boulton* (a), where one of two secretaries deposited certain shares as an individual, and no formal notice was given. It was held that his personal knowledge was not sufficient, because it would have been possible to give notice to the other secretary, and the Lord Justice appears to have thought that the other secretary was the proper person to receive the notice.

That

(a) 1 *De G. & J.* 177; *S. C.*, *De G. & J. Bcy. App.* 51.

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That, however, is not by any means the case with which I have to deal. Here there is but one secretary, and this was a company transaction in which all the directors and the one secretary of the company joined. Without, therefore, giving any opinion upon the expressions attributed to the Lord Justice *Turner*, I am clearly of opinion that the case of *Ex parte Boulton* (a) does not in any degree stand in the way of the decision which is most reasonable to be arrived at here, namely, that there has been no neglect in giving notice on the part of the bank, since they could not have given a more effectual notice than that which was actually derived by every party to whom they might have given it from the transaction itself. There cannot, therefore, be imputed to the bank any consent that the bankrupt should remain the reputed owner of the shares. It would have been perfectly unnecessary for the bank to have written a formal letter reporting everything that had been done to the parties who were already fully acquainted with it.

In my judgment, therefore, the present Appellant is entitled to the shares, and will add his costs to his debt. The assignees will have their costs out of the estate.

(a) 1 *De G. & J.* 163; *S. C.*, *De G. & J. Bcy. App.* 37.

1865.

Ex parte CHARLES TOPPING and Others.

In the Matter of GEORGE LEVEY and CHARLES ROBSON, Bankrupts.

January 9.
February 11.
Before The
Lord
Chancellor
LORD
WESTBURY.

THIS was the appeal of *Charles Topping* and others from a decision of Mr. Registrar *Winslow* sitting as a Commissioner in Bankruptcy, whereby he rejected a proof for 40*l.* 11*s.* 6*d.*, tendered by the Appellant *Charles Topping* on behalf of the separate creditors of the bankrupt *George Levey*, against the separate estate of the bankrupt *Charles Robson*.

A firm of two became bankrupt, one partner being indebted to the other. The debt arose from a contract apart from the co-partnership, and was in existence at the time of the adjudication. It was admitted that there could not be any surplus of the debtor-partner's estate for the joint creditors, whether the

The proof was tendered in respect of a debt due to the bankrupt *George Levey* from the bankrupt *Charles Robson*, to whom, in the year 1834, the bankrupt *George Levey* had out of his own private moneys made an advance to enable the bankrupt *Charles Robson* to increase his business capital. For the purpose of the argument before the Lord Chancellor Lord *Westbury* it was admitted

debt was allowed to be proved against that estate by the creditor-partner or not:—*Held*, to be a proper case for relaxing the general rule, and that the creditor-partner might prove against the debtor-partner's estate, and it was so ordered with a declaration that the proof must be subject to be expunged, and the dividend refunded, if any surplus of the debtor-partner's estate should arise for the benefit of the joint creditors.

July 26, 28.
Before The
Lord
Chancellor
LORD
CRANWORTH.

A debtor executed a deed of inspectorship, which was intended to operate under the Bankruptcy Act, 1861, s. 192, and which provided for payment of the debts by instalments, and the avoidance of the deed in certain contingencies, one of which happened, and for the revivor of the debts in that event, deducting dividends received under the deed. A certain creditor was mentioned as such in one of the schedules to the deed. The debt of this creditor was also mentioned in the statutory account of debts of the debtor, which was verified by his affidavit; and the creditor received a dividend on his debt from the inspectors under the inspectorship:—*Held*, that the debt, being otherwise barred by the Statute of Limitations, was not by any of these circumstances taken out of the operation of the statute.

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mitted that the debt was unaffected by the Statute of Limitations.

The bankrupts were adjudged bankrupts as co-partners in *January*, 1864, and the Appellant *Charles Topping* was one of the assignees. The other Appellants were separate creditors of the bankrupt *George Levey*.

It was admitted at the bar that the separate estate of the bankrupt *Charles Robson* would be insolvent, whether the proof in question was admitted or not, and that there could be nothing coming from that estate for the joint creditors.

Mr. *De Gex* for the Appellants.

The rule in bankruptcy with reference to the proof under a joint adjudication by one partner against his co-partner's estate is laid down in the several text books, as for example, Messrs. *Montagu* and *Ayrton's* Bankrupt Law (a), and Mr. *Deacon's* Bankruptcy (b); but it is nowhere better stated than in Mr. *Lindley's* Book on Partnership (c). Speaking of the joint creditors, Mr. *Lindley* says, "The rights of the joint creditors preclude one partner from ranking as a separate creditor of his co-partner until the joint creditors are paid in full." Speaking of the separate creditors, he says, "They are obviously benefited by the rule which prevents one partner from proving against the separate estate of his co-partner; but it is not for their sake that such rule has been established (d), and where the reason for the rule ceases to exist, the rule itself ceases to be applicable."

Hence

(a) Page 274, ed. 2.

1182, 1185, ed. 2.

(b) Page 850, ed. 3.

(d) But see *Ex parte Collinge*,⁴

(c) Pages 1008, 1011, ed. 1; *De G.*, J. & S. 533. *Supra*, p. 289.

Hence, if there never were any joint debts, or if all those which once existed have ceased to exist, either because they have been paid, barred, satisfied or converted into separate debts, then one partner who is a creditor of another, may, on the bankruptcy of the latter, prove against his separate estate in competition with his other separate creditors." Mr. *Lindley's* reasoning is unanswerable, and this case, where, as is admitted, there is no possibility whether this proof against the separate estate of *Robson* be admitted or not of any surplus arising from that estate, which would enure for the benefit of the joint creditors, falls within its scope. Even did it not do so, the cases of *Ex parte Moore* (a); *Ex parte Carter* (b); *Ex parte Ellis* (c); *Ex parte Rawson* (d); *Ex parte Robinson* (e), and *Ex parte May* (f), if carefully examined, do not, as they have been supposed to do, require the actual non-existence of joint debts as a condition precedent to the right of one partner to prove against his co-partner's estate; and to reject this proof in the present case—a case where by no possibility could *Levey* be said to be proving in competition with his own, the joint creditors—would be simply to favour the separate creditors of *Robson* at the expense of the separate creditors of *Levey*, to pay the former in fact with the money of the latter, and moreover by possibility to damnify those very joint creditors themselves, for whose benefit a surplus might by the admission of this proof in favour of *Levey's* estate be produced from that estate. I submit, therefore, that upon all these considerations the general rule should in this case have been relaxed and the proof admitted.

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Mr.

(a) 2 Gl. & J. 166.

(b) *Ibid.* 233.

(c) *Ibid.* 312.

(d) *Jac.* 274.

(e) 4 D. & Ch. 499.

(f) *M. & Ch.* 18; 3 Deac. 382.

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Mr. *Martineau*, for the assignees, who represented the joint estate.

I am willing to admit, for the purpose of the argument, that the debt, in respect of which it is sought to prove against the estate of *Robson*, is not barred by the Statute of Limitations. But I take no part in the argument, for it is clear upon the accounts in the bankruptcy that whether the proof be admitted or not *Robson's* separate estate is insolvent. The joint creditors are only interested, in fact, in any surplus which may come from *Levey's* estate; and in so far as the admission of the proof here may indirectly tend to further that result, I claim the benefit of Mr. *De Gex's* argument.

Mr. *Robertson Griffiths* for a separate creditor of *Robson*, who had proved his debt against his estate.

The rule which it is sought to infringe is derived from sound principles of equity, and has existed time out of mind. It should not be infringed on the grounds of possible hardship in a particular case, even were its infraction not certain to open the floodgates of collusion. There must always be a possibility of a surplus of the separate estate against which the proof is sought to be admitted.

Mr. *De Gex* in reply.

The impossibility of a surplus of *Robson's* estate is here admitted.

He referred to *Ex parte Gill (a)*.

The

The LORD CHANCELLOR.

The right which, under an adjudication of bankruptcy against two partners, one of them who is a creditor of his co-partner, has to prove against the separate estate of his debtor, where it is clear that whether such proof be admitted or not there will be no surplus of the separate estate of the debtor partner available for the purposes of the joint creditors, must be considered by the light of certain artificial rules which are derived from the principles of the Court of Chancery as to marshalling, and which were embodied for the first time in an order made in bankruptcy by Lord *Loughborough* in the year 1794 (a).

By

(a) The order in question, which was issued on the 8th *March*, 1794, and will be found in extenso in *Henley's Bankrupt Law*, p. 191, App., ed. 3, and 1 *Mont. & Ayr., B. L.* 454, ed. 2, is, so far as it is material for the purposes of this report, as follows:—
“ And I do further order, that the commissioners do cause distinct accounts to be kept of the joint estate, and also of such separate estate or estates: and that what shall be found to belong to the separate estate or estates shall be applied, in the first place, in or towards satisfaction of the debts of the respective separate creditors; and in case there shall be any overplus of the joint estate, after all the joint creditors shall be paid and satisfied their whole demands, that the share or shares, interest or interests, of the bankrupt or bankrupts, whose

separate estate or estates is or are to be applied in manner before directed in such overplus, be carried to the account of his or their separate estate or estates, and be applied in or towards satisfaction of his or their separate debts; and in case there shall be any overplus of the separate estate or estates of such bankrupt or bankrupts, after all their separate creditors shall be paid and satisfied their whole demands, that the overplus of such separate estate or estates be carried to the account of the joint estate, and be applied in or towards satisfaction of the joint debts; and that the costs of taking such accounts be paid out of such separate estate or estates, and be settled by the commissioners, in case the parties differ about the same.”

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By the effect of that order separate accounts are kept of the joint estate and of the separate estate of each partner, and if there be any amount of joint estate the joint creditors are not admitted to prove against the separate estate until the separate creditors are paid, and then they are to receive from the separate estate the surplus only which remains.

The consequence is that it has been held that one partner cannot prove against his co-partner, because, in ordinary cases, that proof would diminish the surplus of the estate of the debtor partner, and thereby the creditor-partner, if admitted to prove, would come into competition with his own creditors, namely, the joint creditors, and detract to the extent of the proof from the benefit which they would derive from the separate estate. Therefore, it has been laid down as a general rule that a partner cannot be permitted to prove against the estate of his co-partner until the joint debts are satisfied.

The question here is whether, under the circumstances of this case, that rule so expressed should be confined within the limits of the purpose by reason of which it was framed, or whether it should be carried out to the letter when the reason or purpose ceases to have any application.

There have been several cases before Lord *Eldon*, which are reported in the second volume of Messrs. *Glyn and Jameson's Reports*, but they have principally arisen under circumstances where the debt sought to be proved by one partner against his co-partner has arisen in respect of transactions which have taken place subsequently to the bankruptcy; as, for example, where the partner has paid to the joint creditors more than properly

perly he ought to have paid, and is entitled therefore to contribution from his co-partner.

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But the case before me is of a different kind, and I regard it as consisting entirely of these circumstances, to which I mean to limit my decision, namely, that the debt sought to be proved by the partner against his co-partner is a debt arising from an undisputed contract apart from the co-partnership, and which was in existence at the time of the adjudication in bankruptcy. I also limit my decision to a case where, as in this case, by no possibility can there be any surplus of the partner's estate against which proof is proposed to be made, whether the proof be admitted or not.

Limiting, then, my decision to a case so circumstanced, I think it reasonable and just that the rule should not be extended beyond the reason which introduced it and was the cause of its being laid down; and if it be true that the estate of the partner against which the proof is tendered cannot by possibility yield a surplus, it would be unreasonable and unjust to refuse the opportunity of proof being made.

It has been justly said by Mr. *De Gex* in argument that the result of the rejection of the proof would be to pay the creditors of one partner with the money of another, and also, as he has said, it would not be difficult to suggest a state of circumstances in which the joint creditors would be losers by the rule being observed. I will put one case. Suppose the separate estate of one partner to be 10,000*l.*, and his separate debts to be 10,000*l.*, exclusive of a debt due to his co-partner; if proof of his co-partner's debt were not admitted the other separate creditors would be paid in full. But if he owed 10,000*l.* to his co-partner, and proof were admitted, then

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then the creditors would receive only 10s. in the pound. Now suppose the co-partner to be indebted to his separate creditors to the extent of 1,000*l.*, but to have no assets beyond the debt which is due to him from his partner. If you admit the co-partner to prove against the estate of his partner for this debt you realise 5,000*l.*, and the surplus of that sum over 1,000*l.* will be for the benefit of the joint creditors, but if you refuse to admit the proof you lose the balance of the 5,000*l.* In such circumstances the rule which was adopted nominally for the benefit of the joint creditors would, if it were adhered to, in reality deprive them of 4,000*l.* Many other cases might be put in which injustice would arise if we were to pursue the rule to the letter when its spirit ceases to have any application.

In my judgment, therefore, the proof by one partner against the separate estate of another partner ought in this case to be admitted. But inasmuch as contingencies may arise which may render the separate estate of the partner larger than is now contemplated, there should be added to the order a declaration that the proof must be subject to be expunged and the dividend to be refunded in the case of any such surplus of the estate of that partner occurring for the benefit of the joint creditors.

In accordance with the above judgment (a), the Appellants again tendered the proof in the Bankruptcy Court, but it was again rejected by Mr. Registrar *Winslow*, sitting

(a) As to which see *Ex parte* the Lords Justices, 20 December, 1872, to be reported in the *Law Bunk.* 39; *Lacey v. Hill*, before *Reports*, 8 Ch. App.

sitting as Commissioner, and confirming the decision of Mr. Registrar *Murray*, before whom the proof had first been tendered, on the ground that the assumption on which the appeal had been argued, viz., that the debt was not barred by the Statute of Limitations (a), was incorrect. It was admitted that this was so, apart from the following circumstances, which it was contended took the case out of the operation of the statute.

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In *July*, 1862, the debt having been incurred in 1834, a deed of inspectorship, which was intended to operate under the Bankruptcy Act, 1861, s. 192, was executed by the bankrupts in favour of their creditors. This deed was expressed to be made between the bankrupts of the first part, certain gentlemen, of whom the Appellant *Charles Topping* was one, as inspectors, of the second part, and the several persons, companies and partnership firms, whose names and seals were set and affixed in some or one of the schedules thereto, being joint creditors of the bankrupts and *Francis Burdett Franklyn*, a late partner of theirs, or separate creditors of the same three persons, and all other the joint creditors of the three, and all other the separate creditors of the three, of the third part.

It provided for the business of the firm being carried on for a period not exceeding three years under the inspectorship of the parties of the second part, and for the payment of the debts of the bankrupts in full by instalments at given intervals; and it also provided for the avoidance of the deed if (amongst other things) at any time during the continuance of the inspectorship any execution or other process of law should be issued and enforced against the three co-partners or any of them
which

(a) 9 Geo. 4, c. 14, s. 1.

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which should or might, in the opinion of the inspectors, interfere with or prejudice the arrangement by the deed contemplated; and in that event the inspectors were empowered, by writing under their hands, to declare the deed at an end, and thereupon the deed, and every clause, covenant, matter and thing therein contained (so far as the same tended to restrain the creditors from suing for their debts), were to cease and determine, and the creditors were thenceforth to be at liberty to sue for or prove for the full amount of their respective debts or claims, except so far as they had previously received the same from other sources than under these presents; and if any instalment should previously have been made under the deed the creditor who should have received the same was to account for the same (but without any liability to refund the same) and to be admitted as a creditor for the balance only of his debt or claim after deducting the amount so received.

The bankrupt *George Levey* executed this deed as well in his capacity of a party thereto of the first part, as in his capacity of a separate creditor of the bankrupt *Charles Robson*, the amount of his debt being entered in the third schedule to the deed as 404*l.* 1*l.* 6*d.*

The bankrupt *Charles Levey* also executed the inspectorship deed, and it, with its schedules annexed, was registered, under the 192nd section of the Bankruptcy Act, 1861, on the 12th of *August*, 1863, the bankrupt *Charles Robson* making, as required by the first article of the General Order in Bankruptcy of the 22nd of *May*, 1862 (a), the usual affidavit verifying an account of his debts. This account contained the name of the bankrupt

George

(a) See this order in *De Gex* p. 23, note; and also *supra*, & *Horton Smith's Arrangements* p. 11, note.
between Debtors and Creditors,

George Levey as an assenting creditor in respect of the debt in question, and purported, as required by the order and its schedule, to be a full account of his debts amounting to 10*l.* and upwards, "to the best of his knowledge, information and belief."

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The inspectorship proceeded for some time under the provisions of this deed, and a dividend was paid thereunder by the inspectors, in *November*, 1863, to the creditors, amongst whom the bankrupt *George Levey* received a dividend in respect of the debt which he claimed against the estate of the bankrupt *Charles Robson*.

Ultimately, however, the deed was, by the Court of Queen's Bench, held to be not binding as against non-assenting creditors.

The result was, that execution was issued against the bankrupts; the inspectors, under the powers vested in them by the deed, put an end to it; and the bankrupts were so adjudged on their own petition.

Mr. De Gex and *Mr. Fletcher* for the Appellants.

July 26.

The facts of the case take it out of the Statute of Limitations. A promise to pay is implied from an acknowledgment unless negatived by its terms. Here there is nothing to negative it, but, on the contrary, there is a contract for payment in full if the deed should be avoided, an event which happened. There has been, moreover, part payment. If this was a payment on account generally, it is of course sufficient. If on the footing of the deed, then the instrument itself provides that if (as happened) it was avoided the payment should be taken as a part payment.

They

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They cited *Eicke v. Nokes* (a); *Mountstephen v. Brooke* (b); *Smith v. Poole* (c), and *Tanner v. Smart* (d), and distinguished *Everett v. Robertson* (e) as a case in which the implication of a promise was excluded.

Mr. *Martineau*, who appeared for the assignees as representing the joint estate, took no part in the argument.

Mr. *Robertson Griffiths*, for the separate creditor of the bankrupt *Charles Robson*, supported the decision under appeal, relying on *Everett v. Robertson* (e); *Davies v. Edwards* (f).

Mr. *De Gex* in reply.

The LORD CHANCELLOR (LORD CRANWORTH).

July 28. The question raised in this case was, whether a certain debt was taken out of the Statute of Limitations.

It has been contended that the debt was acknowledged because the debtor executed a deed of inspectorship, and because the debt in question was included in a schedule to that deed, as being a debt due from him to the creditor who was named. The question is, whether this was a sufficient acknowledgment to take the debt out of the statute. I was strongly of opinion that it was not.

But then there arose the further question whether the result would be affected by this, that there was an affidavit

(a) 1 *Moo. & R.* 359.
 (b) 3 *B. & Ald.* 141.
 (c) 12 *Sim.* 17.

(d) 6 *B. & C.* 602.
 (e) 1 *Ell. & Ell.* 16.
 (f) 7 *Exch.* 22.

davit made by the debtor in which he positively swore that this debt was due. But I think that that makes no difference, because the affidavit was only to the effect that the debt was due modo et formâ as therein stated. The debtor swore that it was a debt payable out of the assets to be administered under that deed of inspectorship. The statute says that no acknowledgment or promise shall be sufficient unless it be a promise or acknowledgment contained in some writing to be signed by the party chargeable, and an acknowledgment that the whole debt is due is a sufficient acknowledgment within the meaning of the statute, if it be an admission that the whole is immediately recoverable. But the acknowledgment is not sufficient if the admission be that the debt can only be paid in part or in some qualified mode. That was decided in *Everett v. Robertson* (a) by the Court of Queen's Bench, and if I felt any doubt as to the principle, which I do not, I certainly should not think of interfering, sitting as I do here in Bankruptcy, with a decision of the Court of Queen's Bench.

In my judgment, the deed is only the creation of a trust to pay by instalments, and the affidavit contains an admission of the debt only modo et formâ, and hence there has not been an acknowledgment within the statute.

Then it is said that there has been part payment because the inspectors under that deed have paid a dividend. But there is just the same objection to that argument. Payment of a dividend under the Insolvent Act has been held by the Court of Exchequer, in *Davies v. Edwards* (b), not to be a sufficient part payment to take the case out of the statute, and the payment of a dividend

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(a) 1 *Ell. & Ell.* 16.

(b) 7 *Exch.* 22.

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by an inspector is open to precisely the same objection. Part payment, in order to take the case out of the statute, must be not only payment on account of the debt, but payment accompanied with an admission, express or implied, that the balance of the debt is due and payable on demand. That was clearly not the case with this payment; the residue was not payable on demand; the promise was only that parts of the residue should be paid at certain intervals of time.

It seems to me, therefore, that this contention is open to exactly the same objection as that with respect to the acknowledgment, and this appeal must be dismissed.

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Ex parte THE DARLINGTON DISTRICT JOINT
STOCK BANKING COMPANY.

In the Matter of RICHES AND MARSHALL'S
TRUST DEED.

Nov. 9.

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Jan. 18.

Before The
Lord
Chancellor
LORD
WESTBURY.

THIS was an appeal by the *Darlington District Joint Stock Banking Company* from the rejection by Mr. Commissioner *Abrahall* of a proof tendered on behalf of the Appellants for 1,460*l.* 4*s.* 9*d.* against the estate of two debtors named *Riches* and *Marshall* respectively.

Generally speaking a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partner-

The estate in question was being wound up under the provisions of a trust deed executed by the debtors for the

ship is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it. In that case authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud.

The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so.

Where the bankers of an individual member of a firm, knowing that the firm banked elsewhere, received from and discounted for their customer bills of exchange, purporting to be drawn and endorsed by the firm and also endorsed by the customer, the signatures of the firm as drawers and endorsers and of the customer as endorser, as well as the whole of the bills, with the exception of the signatures of the acceptors, being in the customer's handwriting:—*Held*, that the transaction showed on its face a conversion by the customer of partnership property to his own purposes; that the bankers had been guilty of great negligence in abstaining from inquiry; and that they could only claim as against the customer's co-partners so far as the customer himself might have claimed compensation from them in respect of moneys paid by him out of his private account for partnership purposes.

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the benefit of their creditors, and registered under the 192nd section of the Bankruptcy Act, 1861, and the proof the rejection of which was under appeal was tendered in respect of certain bills of exchange expressed to have been drawn and also endorsed in the name of the late firm of *Riches, Kay & Marshall*, of which the debtors were the surviving partners.

The business of the firm, which as a partnership began in 1862, had been that of shipbrokers, and also of coal fitters; but in this latter respect the business appeared to have been confined to transactions with a certain gentleman named *Spark*, who was the trustee under the trust deed.

Kay had been the eldest and most experienced of the partners. He had exercised great influence over his co-partners, and to him the management of the whole of the business had been given. The financial concerns of the partnership had been also entirely under his control.

The firm had had a banking account with the *Union Bank* at *Sunderland*. *Kay* had kept a separate account with the Appellants' *Stockton* branch. The Appellants had been well aware that the *Union Bank* kept the partnership account.

Kay died in *January*, 1864, and after his death a fraud of a very singular description was found to have been committed by him.

The partnership, in the capacity of shipbrokers, had been in the habit of advancing small sums of money to the masters of vessels and to the captains of vessels which they were employed to charter and fit out; and
 in

in connection with these advances *Kay* had adopted this contrivance.

He had taken stamped slips of paper on which bills of exchange were usually drawn, and doubling down either end of the slips, so as to present only the middle parts, he had written upon these in pencil the figures of small sums of money which as shipbrokers they had paid to the masters or captains; and he had received or taken from each master or captain his signature at the foot of the pencil figures, intending thereby to denote that the individual signing had received the sum of money in question. He had then rubbed out or expunged the pencil figures, and thereby had acquired and had slips of paper fit for writing a bill upon, stamped and with the genuine signatures across their faces. Over these signatures he had written the ordinary words of acceptance: and he had converted the bills into bills of exchange, to which he appended the name of the partnership firm "*Riches, Kay & Marshall.*"

He had carried on this species of forgery or fraudulent manufacture of bills of exchange to a very large amount, and those bills so created had been carried by him to his own private bankers, the Appellants at *Stockton*, and were there at his instance discounted by the Appellants.

At the back of the bills *Kay* had written the name of the partnership firm as indorsers, and beneath that he had written his own individual name. Each bill therefore purported on the face of it to have been drawn by the partnership, and to have been accepted by an individual whose acceptance had been obtained in the manner described, and each bill also appeared to have been indorsed by the partnership to the individual partner *Kay*. In that state, as has been stated, they

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were

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were carried by him to his bankers, the Appellants, and negotiated. It was on bills thus created that the proof, the rejection of which was the subject of the present appeal, was tendered.

Mr. *Bacon* and Mr. *De Gex*, for the Appellants, contended that this was altogether different from cases in which a partner accepts, in the name of his firm, a bill drawn on the firm by a separate creditor of the partner. Such a transaction is *prima facie* invalid, the acceptor not being indebted to the drawer, and the latter having therefore direct notice of the want of authority of the partner, and of the untruth of the words "for value received." In the present case the bill purported to be drawn by the firm on its debtor, then to be endorsed by the firm to the partner, and by him to the bank, all of which proceedings were, on the face of them, regular and proper.

They referred to *Ridley v. Taylor* (a) and *Ex parte Bushell* (b), and distinguished *Ex parte Agace* (c); *Shirreff v. Wilks* (d); *Ex parte Peele* (e); *Ex parte Bonbonus* (f); *Ex parte Goulding* (g); *Frankland v. McGusty* (h).

At the conclusion of their arguments and without calling on

Mr. *Greene* and Mr. *Roxburgh* for the Respondent, the trustee under the trust deed,

The

(a) 13 *East*, 175.

(b) 3 *M., D. & De G.* 615.

(c) 2 *Cor.* 312.

(d) 1 *East*, 48.

(e) 6 *Ves.* 602.

(f) 8 *Ves.* 540.

(g) 2 *Gl. & J.* 118.

(h) 1 *Knapp, P. C.* 274.

The LORD CHANCELLOR said that his impression was that the decision of the learned Commissioner was correct, but that his Lordship would read through the papers in the case, and for that purpose reserved his judgment.

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The LORD CHANCELLOR (after stating the facts to the effect of the above statement of them), proceeded as follows :—

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The firm of the partnership (the drawers), the indorsement to *Kay* and the name of *Kay* are all in the handwriting of *Kay*. The bills therefore appear on the face of them to be securities belonging to and to be the property of the partnership, and any person looking at the indorsement would immediately presume that *Kay* had indorsed over the partnership security to himself; and if that individual were the private creditor of *Kay* to whom the bill was tendered he would also know that *Kay* was using this partnership security, which he had thus appropriated for his own private purposes.

The law on the subject is clear and well established.

Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority, unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it. In that case authority
by

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by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act, he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud. These principles have been established by a long series of decisions—if indeed decisions were required in respect of a matter so plain and obvious—as, for example, *Ex parte Peele* (a); *Ex parte Bonbonus* (b), and *Ex parte Goulding* (c), and the other cases which were referred to in the course of the argument. I may also adopt a passage which I find in a book of considerable merit, the late Mr. *Smith's Compendium of Mercantile Law* (d)—a passage which was cited with great approbation by the Judges of the Court of Common Pleas in the recent case of *Leverson v. Lane* (e)—and which is as follows:—"It would seem that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by shewing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so."

It is immaterial whether the partnership security is applied in discharge of an existing debt or whether it is used by the individual partner for the purpose of obtaining money from his own bankers to be applied for his own personal purposes.

Some

(a) 6 V. & A. 602.

(b) 8 V. & A. 510.

(c) 2 G. & J. 118.

(d) Page 44, ed. 2; p. 46, ed. 6; p. 45, ed. 7.

(e) 13 C. B., N. S. 278, 282, 285.

Some attempt was made on the part of the Appellants to show that the moneys advanced by them to *Kay* were used by him for partnership purposes; but, assuming the attempt to be made with success, the result would merely be that the form of proof would be a proof by the Appellants in respect of that debt, if any, which was due from the partnership to *Kay* in respect of the money so applied; a result which would avail the Appellants but little. In point of fact, however, there is no doubt that *Kay* greatly defrauded his co-partners.


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Some attempt, again, was made to show that the partners ought to have been cognisant of a transaction of this description. But there is nothing to justify any such inference or conclusion. It is quite clear that this gross forgery and fraud of *Kay* was a scheme resorted to by him simply for his own purposes, and one which he carried on with a view to his own private advantage through the agency of the Appellants, his separate bankers.

The Appellants themselves were undoubtedly guilty of great negligence. They must have seen on the face of the bills that they had been called into being by the individual partner who wrote the partnership name originally at the foot of the bills; that the same hand wrote also the indorsements, and that the same hand added the individual name of *Kay*.

On the face of the transaction, therefore, it was plain that the partnership security was converted by the individual partner into his own private personal property, in order that it might be applied to his own private purposes, and yet the Appellants received such bills and
 discounted

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THE DARLING- the firm itself had a proper bank of its own with which
TON, & C. the ordinary partnership account was kept.
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TRUST DEED. The Appellants' case cannot be put higher than the
right of the individual partner with whom they dealt, and
they can have no claim to be compensated by the part-
nership unless that be the right of that individual partner.

The learned Commissioner decided rightly, in my judg-
ment, in rejecting this proof: and the appeal must be
dismissed with costs.

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Ex parte THOMAS CHAVASSE, ISAAC JENKS
and WILLIAM GEORGE DIXON.

In the Matter of WILLIAM JOSEPH GRAZE-
BROOK, a Bankrupt.

Jan. 18.

April 22.

Before The
Lord
Chancellor
LORD
WESTBURY.

THIS was an appeal by *Thomas Chavasse, Isaac Jenks and William George Dixon*, who were the trustees of a deed for the benefit of creditors executed by *Horace Chavasse*, and registered under the Bankruptcy Act, 1861, s. 192, from the dismissal with costs by Mr. Commissioner *Perry* of a petition presented by them in the bankruptcy of *William Joseph Grazebrook*.

A joint adventure between the subjects of a neutral power for running a blockade established by one of two foreign belligerents against the ports of the other with a cargo of arms and ammunition is not an unlawful contract, but one from which the ordinary rights of property result.

The object of the petition was to obtain an apportionment as between the Appellants and the bankrupt's estate of part of the proceeds of a joint venture on the part of the bankrupt and *Horace Chavasse* for running the blockade instituted by the Northern against the ports of the Confederate States of *America* during the late war with a cargo of arms and ammunition.

International law subjects a neutral merchant who transports contraband of war

The part of the proceeds in question was represented

by

to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined; but the commerce which was lawful for the neutral with either belligerent country before the war is not made by the war unlawful or capable of being prohibited by both or either of the belligerents.

If a British shipbuilder builds a vessel of war in an English port and arms and equips her for war *bonâ fide* on his own account as an article of merchandise, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act (59 *Geo. 3*, c. 69).

The object of a proclamation is to make known the existing law, and it can neither make nor unmake law.

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by a quantity of cotton, in which part of the immediate produce of the venture had been invested.

The learned Commissioner held that the joint venture between *Horace Chavasse* and the bankrupt was illegal, and was impeachable because the dealings under it were illegal or prohibited, and on this ground, as has been stated, dismissed the petition with costs.

The present appeal was from that decision.

Mr. *Daniel*, Mr. *De Gex* and Mr. *Thomas Jones* appeared for the Appellants; and

Mr. *Aspinall* and Mr. *Charles Russell* for the Respondents, the assignees of the bankrupt's estate.

The judgment of the Lord Chancellor followed in great measure the line of argument on the part of the Appellants, and sufficiently shows the scope of that on the part of the Respondents.

The authorities referred to were the following:—

The Santissima Trinidad (a); *The Attorney General v. Sillem* (b); *Holman v. Johnson* (c); *The Nancy* (d); *The Imina* (e); *The Rosalie and Betty* (f); *The Betsey* (g); *Bird v. Appleton* (h); *Harratt v. Wise* (i); *Naylor v. Taylor* (k); *Medeiros v. Hill* (l); *The Neptune* (m); *The Shepherdess* (n); *The Tutela* (o); *Armstrong*

- | | |
|-----------------------------------|--|
| (a) 7 <i>Wheaton</i> , 283, 340. | (i) 9 B. & C. 712. |
| (b) 2 H. & C. 431, 504, 505, 523. | (k) 9 B. & C. 718; and see <i>The Helen</i> , L. R., 1 Adm. & Ecc. 1; <i>Burton v. Pinkerton</i> , L. R., 2 Exch. 340. |
| (c) <i>Comp.</i> 341. | (l) 8 <i>Bing.</i> 231. |
| (d) 3 <i>Rob.</i> 122. | (m) 2 <i>Rob.</i> 110. |
| (e) 3 <i>Rob.</i> 167. | (n) 5 <i>Rob.</i> 262. |
| (f) 6 <i>Rob.</i> 386 (n). | (o) 6 <i>Rob.</i> 177. |
| (g) 1 <i>Rob.</i> 93. | |
| (h) 8 T. R. 562. | |

strong v. Armstrong (a); *De Metton v. De Mello (b)*; *Richardson v. The Maine Fire and Marine Insurance Company (c)*; *Sharp v. Taylor (d)*; *Ralli v. The Universal Marine Insurance Company (e)*; *Curtis v. Perry (f)*; *Brackenbury v. Brackenbury (g)*; *Keir v. Lee-man (h)*; *Shiffner v. Gordon (i)*; *Statt. 59 Geo. 3, c. 69 (The Foreign Enlistment Act)*, and *16 & 17 Vict. c. 107, s. 150*; *The Queen's Proclamation of 13th May, 1861 (k)*; *Kent's*

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- (a) 3 M. & K. 45.
- (b) 12 East, 234.
- (c) 6 Massachusetts Rep. 102.
- (d) 2 Ph. 801.
- (e) 2 J. & H. 159, 175; 4 De G., F. & J. 1.
- (f) 6 Ves. 739.
- (g) 2 J. & W. 391.
- (h) 6 Q. B. 308; 9 Q. B. 371.
- (i) 12 East, 296.

(k) The material portions of this proclamation are as follows. It recited amongst other things the Foreign Enlistment Act, and proceeded as follows: — "Now in order that none of our subjects may unwarily render themselves liable to the penalties imposed by the said statute, we do hereby strictly command that no person or persons whatsoever do commit any act, matter or thing whatsoever contrary to the provisions of the said statute upon pain of the several penalties by the said statute imposed and of our high displeasure: And we do hereby further warn all our loving subjects and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our royal proclamation and of our high displeasure, to do any acts

in derogation of their duty as subjects of a neutral Sovereign in the said contest, or in violation or contravention of the law of nations in that behalf; as for example and more especially • • • by fitting out, arming or equipping any ship or vessel to be employed as a ship of war or privateer or transport by either of the said contending parties, or by breaking or endeavouring to break any blockade lawfully and actually established by or on behalf of either of the said contending parties; or by carrying officers, soldiers, despatches, arms, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties; all persons so offending will incur and be liable to the several penalties and penal consequences by the said statute or by the law of nations in that behalf imposed or denounced: And we do hereby declare, that all our subjects and persons entitled to our protection who may misconduct themselves in the premises will do so at their

1865. *Kent's Commentaries* (a); *Wheaton's International Law* (b); *Arnould on Marine Insurance* (c); *Duer on Marine Insurance* (d); *Bacon's Abr. "Prerogative,"* B. (e); *Chitty on Prerogative* (f); *Stephen's Commentaries* (g).

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Mr. *Daniel*, in reply, referred to the correspondence between Mr. *Jefferson* and Mr. *Hammond* (h).

At the conclusion of the argument the Lord Chancellor reserved his judgment.

The LORD CHANCELLOR.

Apr. 22. In the view of international law the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations and they become belligerents, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects.

The belligerent power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture when found on the sea, the high road of nations, any munitions of war which are destined,

peril and of their own wrong, and that they will in nowise obtain any protection from us against any liabilities or penal consequences, but will on the contrary incur our high displeasure by such misconduct."

(a) *Vol. 1, p. 145.*

(b) *Page 813.*

(c) *Page 762, 2nd ed.*

(d) *Vol. 1, pp. 623, 748, 750.*

(e) *Page 405.*

(f) *Page 172.*

(g) *Vol. 4, chap. 8.*

(h) *See 2 H. & C. 478 sqq., note.*

destined, and in the act of being transported in a neutral ship, to its enemy.

This right which the laws of war give to a belligerent for his protection does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject.

In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. These conflicting rights are coexistent, and the right of the one party does not render the act of the other party wrongful or illegal.

There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of this right of the belligerent to seize in transitu munitions of war whilst being conveyed by a neutral to his enemy, speak of the act of transport by the neutral as unlawful and prohibited commerce.

But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents, and all that
international

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international law does is to subject the neutral merchant, who transports the contraband of war, to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequence beyond the judicial condemnation of the ship and cargo, nor can he make it the subject of complaint.

This is well explained by *Vattel* in the following passage:—

Speaking as a belligerent power, and in respect of its relations with neutral nations, he says: “Quand je leur ai notifié ma déclaration de guerre à tel ou tel peuple, si elles veulent s'exposer à lui porter des choses qui servent à la guerre, elles n'auront pas sujet de se plaindre au cas que leurs marchandises tombent dans mes mains; de même que je ne leur déclare pas la guerre, pour avoir tenté de les porter. Elles souffrent, il est vrai, d'une guerre, à laquelle elles n'ont point de part; mais c'est par accident. Je ne m'oppose point à leur droit, j'use seulement du mien; et si nos droits se croisent et se nuisent réciproquement, c'est par l'effet d'une nécessité inévitable. Ce conflit arrive tous les jours dans la guerre”(a).

Vattel must here be considered as speaking of the acts of the subjects of a neutral power, and not of the neutral government itself, for the supplying of warlike stores to a belligerent by a neutral state would clearly be a breach of neutrality.

The same doctrine as to the freedom of the commerce of a neutral subject is more explicitly stated by Mr. Chancellor *Kent* in his Commentaries(b), and was most distinctly

(a) *Le Droit des Gens*, Liv. 3, c. 7, § 111.

(b) *Kent's Comm.* 142

distinctly affirmed in a celebrated decision of the Supreme Court of the United States (a).

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The language of Chancellor *Kent* is clear and comprehensive:—"It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure in transitu. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act."

The material passage of the judgment of the Supreme Court in the case to which I have referred is the following:—"There is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation."

I take this passage to be a very correct representation of the present state of the law of *England* also.

For

(a) *The Santissima Trinidad*, 7 *Wheaton*, 340.

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For if a British shipbuilder builds a vessel of war in an English port, and arms and equips her for war *bonâ fide* on his own account as an article of merchandise, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act (a).

It is true that under the provisions of the Act of the 16 & 17 *Vict.* c. 107, her Majesty has power by proclamation or order in council to prohibit the exportation of certain goods, including arms, ammunition, gunpowder, naval and military stores, but no order in council or proclamation was made in the terms or under the special authority of this statute.

Great reliance, however, was placed by the counsel for the Respondents on the Queen's Proclamation of the 13th *May*, 1861, although it was admitted that it could not be treated as made under the authority of the last-mentioned statute.

I need not observe that it is the object of a proclamation to make known the existing law, and that it can neither make nor unmake law. But, in truth, the Proclamation of 1861 is directed, and very properly, to two objects, first to declare that the provisions of the Foreign Enlistment Act would be strictly enforced; and secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent he would incur the penal consequences of the law of nations, and would
receive

(a) *Stat.* 59 *Geo.* 3, c. 69.

receive no protection or relief from these consequences (that is, from capture and condemnation) at the hands of her Majesty.

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The proclamation has no effect whatever on the legality of this adventure.

In my judgment, therefore, this adventure between the bankrupt and Mr. *Chavasse*, whose estate is represented by the present Petitioners, was a lawful contract, and the ordinary rights of property result from it.

It follows that the goods in which the proceeds of the adventure were invested belong to the Petitioners and the bankrupt's estate according to their several interests in that adventure and their contributions to the same; and the Commissioner's order must be reversed and the case remitted to him with a declaration that there was a valid partnership between the bankrupt and Mr. *Chavasse* in the adventure described in the petition, and that the accounts of the partnership ought to be taken, the partnership property sold or otherwise disposed of, and the proceeds applied in payment of the debts of the partnership, and the surplus divided according to the interests of Mr. *Chavasse* and the bankrupt respectively.



1865.



Ex parte BENJAMIN MAYOU.

Mar. 15, 18.

Apr. 22.

Before the

Lord

Chancellor

LORD

WESTBURY.

A partnership of two was dissolved, the outgoing partner assigning to the continuing partner all his share in the partnership assets, and the latter covenanting to pay the partnership debts. At the date of the assignment the firm was insolvent, as was also each of the partners. The firm being shortly afterwards adjudged bankrupt:—*Held*, that the transaction was void; that it did not operate as a conversion of the

In the Matter of WILLIAM EDWARDS-WOOD and JAMES YATES GREENWOOD, Bankrupts.

THIS was an appeal by *Benjamin Mayou* from the dismissal by Mr. Commissioner *Sanders* of a petition presented on behalf of himself and all other the joint creditors of the bankrupts in the bankruptcy of *William Edwards-Wood* and *James Yates Greenwood* by the Appellant.

The bankrupts were partners. Their business was that of brickmakers, and they also held certain leases of a colliery that was expected to be a profitable work.

In the month of *August*, 1863, the bankrupts were in great difficulties and embarrassment.

In the month of *November*, 1863, a trader debtor summons was taken out against them for a debt of £50*l.*, and in the same month several writs for large sums of money were issued against them.

On the 9th of *December*, 1863, they went together to a gentleman of the name of *Goode*, for the purpose of inducing

outgoing partner's property into the separate estate of the continuing partner; and that the whole of the property as it existed belonging to the bankrupts at the date of the assignment must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors.

inducing him either to renew certain bills which he had accepted for the accommodation of the bankrupts, or to make a further advance of money. Mr. *Goode* declined to comply with that application, whereupon the bankrupts determined to dissolve their partnership, and a deed was prepared and executed on that day, whereby *James Yates Greenwood* assigned to *William Edwards-Wood*, who was therein stated to have the intention of continuing the business on his own account, all the share and interest of *James Yates Greenwood* in the mines and veins and beds of coal and other the property comprised in the leases, and also in the stock, plant, machinery, engines, credits and effects belonging, due and owing to the bankrupts as partners, and whereby *William Edwards-Wood* covenanted with *James Yates Greenwood* within three years from the date of the deed to pay all and every the debts due and owing from or by the bankrupts in respect of the partnership, and to pay the rents and royalties and perform all the covenants in the leases, and indemnify *James Yates Greenwood* therefrom and from all actions instituted by virtue of a power of attorney contained in the deed of dissolution.

On an examination of the evidence the Lord Chancellor (from whose judgment the present statement of the facts of the case is in substance taken) was satisfied that at the time of the execution of this deed the partnership was insolvent, and each of the partners was insolvent. There might have been some expectation on the part of *William Edwards-Wood* that, if he succeeded in obtaining advances, the colliery might be profitably worked. In the event that did not turn out to be the case.

On the 24th of *December*, 1863, a petition for adjudication of bankruptcy against the bankrupts was filed

B B 2

in

1865.

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MAYOU.

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in the *Birmingham* Court of Bankruptcy, under which they were adjudicated bankrupts.

An earlier petition filed on the 15th of the same month, with the same object, had been allowed to drop.

By the Appellant's petition he sought a declaration that the dissolution deed of the 9th of *December*, 1863, was fraudulent and void as against the joint creditors of the bankrupts; and that, notwithstanding that deed, the assets of the firm remained joint assets to be administered as such in bankruptcy; or, in the alternative, liberty to the Appellant to prove his debt in the bankruptcy against the separate estate of *William Edwards-Wood*.

The learned Commissioner upon hearing this petition dismissed it, and the present appeal was from that order.

Mr. *Bacon* and Mr. *De Gex* for the Appellant.

The effect of the dissolution deed of the 9th of *December*, 1863, must have been to defeat and delay the joint creditors of the firm by turning the joint estate into the separate estate of *Edwards-Wood*, and as the parties must be assumed to have intended that which was the natural result of their acts, the execution of that deed was an act of bankruptcy. It was also a fraudulent preference of the separate creditors of *Edwards-Wood* over the joint creditors of the firm; *Ex parte Wensley* (a); *Ex parte Zwilchenbart*, *In re Marshall* (b); *Leake v. Young* (c). The cases of *Rose v. Haycock* (d), and
Baxter

(a) 1 *De G.*, J. & S. 273; and on appeal, *De Gex*, 273.
supra, p. 49. (c) 5 *Ell. & Bl.* 955.

(b) 3 *M.*, D & *De G.* 671; (d) 1 *Ad. & Ell.* 460.

Baxter v. Pritchard (a), have no application to a case like the present; nor have cases like *Ex parte Ruffin* (b); *Ex parte Fell* (c), and *Ex parte Williams* (d), which were cases of bonâ fide conversion of joint assets into separate assets upon a dissolution of partnership not necessarily involving any defeat or delay of the joint creditors nor raising any question as to the commission of an act of bankruptcy.

1865.

Ex parte
MAYOU.
 In re
EDWARDS-
WOOD.

Mr. *Daniel* and Mr. *Fry* for the separate creditors of *William Edwards-Wood*.

The dissolution deed was no act of bankruptcy. It is not within the Bankrupt Law Consolidation Act, 1849, s. 67, for it was not a fraudulent grant, conveyance, gift, delivery or transfer, but was only a release or surrender of goods and chattels in which the surrenderee was jointly interested with the surrenderor, and the evidence proves the bona fides of the transaction, and that the parties contemplated the business being carried on by Mr. *Edwards-Wood* alone, with better prospects than would have attended a continuation of the partnership, and that they acted without any intention of defeating any creditor or of preferring one creditor to another, but had simply in view a dissolution, with merely the usual provisions incidental to a dissolution. Nor is the deed void under the statute 13 *Eliz. c. 5*, as a voluntary assignment, or as having the effect or intent of defeating or delaying creditors; *Dutton v. Morrison* (e). Each of the parties to the deed was jointly and severally liable to the creditors of the firm, and the partnership assets could not be said in any way to have been withdrawn from administration in bankruptcy.

They

(a) 1 *Ad. & Ell.* 456.

(b) 6 *Ves.* 119.

(c) 10 *Ves.* 347.

(d) 11 *Ves.* 3.

(e) 17 *Ves.* 193.

1865.

Ex parte
MAYOU.In re
EDWARDS-
WOOD.

They also referred to *Ex parte Peake* (a); *Ex parte Walker* (b); *Ex parte Snow* (c).

Mr. *Little*, for the assignees of the bankrupts' estate, took no part in the argument.

Mr. *Bacon* in reply.

Anderson v. Maltby (d); *Ex parte Rowlandson* (e); and *Ex parte Fry* (f), were also referred to during the arguments.

The LORD CHANCELLOR.

Reserving my final decision until a future occasion, I will nevertheless now state my present impression.

Upon the evidence before me I think it clear that upon the 9th of *December*, 1863, when the assignment which is now impeached was executed by them, both of these gentlemen were insolvent as a firm and they were both also insolvent individually, and being so insolvent they entered into a mutual contract having for its object an attempt to convert their joint property into separate property.

Taking then, in the first place, the principle of law which is embodied in the statute of 13 *Eliz.* c. 5, and applying that to the transaction, I think that it was not competent for the one to make or for the other to accept an assignment of that description, both of them being insolvent at the time.

Taking

(a) 1 *Madd.* 346.

(b) 4 *De G., F. & J.* 509, and
see *In re Kemptner*, L. R., 8 *Eq.*
286.

(c) 1 *Cooke*, B. L. 537.

(d) 4 *Bro. C. C.* 423; 2 *Ves.*

jun. 244.

(e) 2 *V. & B.* 172.

(f) 1 *Gl. & J.* 96.

Taking again the same principle and applying it to the language of the 67th section of the Bankrupt Law Consolidation Act, 1849, I think it clear that this assignment was fraudulent within the meaning of the words of that statute, because it had for its immediate and necessary object and consequence the alteration of the property in such a manner as would defeat or delay the joint creditors. The joint property is taken out of the reach of the joint creditors if effect is given to the assignment.

1865.

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Thirdly, having regard to the principle that a voluntary assignment is in this sense a fraudulent assignment, if I regard the transaction as entered into by one partner alone, I cannot look at it as a conveyance for good or valuable consideration, seeing that the covenant by the assignee of the partner was a covenant entered into by a man in a state of insolvency, and in this sense, being voluntary, it would be fraudulent within the meaning which has been applied to this term.

My strong impression therefore is that this transaction, had it been made the subject of judicial decision before the statute of bankruptcy which introduced these words, "fraudulent grant or conveyance of any lands, tenements, goods or chattels with intent to defeat or delay creditors," would not have been denominated a real, that is a bona fide transaction, and therefore would not have been held valid according to the purport of Lord *Eldon's* judgments in *Ex parte Ruffin* (a), and *Ex parte Williams* (b), for I regard his references to bona fides as being nothing more than a short expression of that principle, which has been expanded more fully into the form now found in the 67th section of the Act of 1849.

The

(a) 6 Ves. 119.

(b) 11 Ves. 3.

1865.
 Ex parte
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 WOOD.

The result is, that if upon further consideration I abide by my present impression, this transaction cannot stand. It is an unfortunate attempt to make a conversion of property, and the subject-matter of the intended assignment not being converted remains as it was at the date of the bankruptcy.

The extremely inconvenient and disastrous consequences which would follow from holding that it is competent to partners in the situation in which these gentlemen found themselves to effect a conversion of property, with all the consequences to which that conversion might be made to lead, need scarcely be adverted to. I will, however, as I have said, further consider the matter and mention the case again.

Apr. 22.

The LORD CHANCELLOR, after stating the facts of the case to the effect of the statements thereof hereinbefore contained, proceeded as follows:—

The question which arises under these circumstances is, whether it was competent to Mr. *Greenwood* to make, and to Mr. *Edwards-Wood* to receive, an assignment of the partnership property which would have the effect of converting the joint estate into the separate estate of Mr. *Edwards-Wood*, of withdrawing from the joint creditors that property to which they were entitled, and also of taking from Mr. *Greenwood's* separate creditors any separate property or interest to which that gentleman might be found to be entitled in that joint property after the joint debts were paid.

Lord *Eldon*, in *Ex parte Williams*(a), very concisely
 sums

(a) 11 Ves. 3.

sums up the principles upon which transactions of this nature must depend as being that of their bona fides.

Can, then, an assignment of this nature be made bonâ fide by a partner when the partnership is in a state of insolvency, and the partners themselves are equally insolvent in their separate character?

The principle of law embodied in the statute 13 *Eliz.* c. 5, and the principle expressed and declared by the Bankrupt Law Consolidation Act, 1849, s. 67, forbid me to hold this assignment to be anything but a fraudulent conveyance,—fraudulent against creditors, and one which would have the effect of delaying and defeating the just creditors of an insolvent person in their attempts to recover and make available the property of that person.

Applying, therefore, that test to the matter, I hold that there was no bona fides in this transaction; that the assignment was fraudulent; that it was void; that did not operate as a conversion of the property of the bankrupt Mr. *Greenwood* into the separate estate of the bankrupt Mr. *Edwards-Wood*; that the whole of the property as it existed belonging to the bankrupts at the date of the deed of the 9th of *December*, 1863, must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors.

The order of the learned Commissioner must therefore be reversed, and a declaration made to the effect which I have stated.

That is, substantially, to grant the prayer of the petition, and the Appellant must have his costs out of the joint estate.

1865.

Ex parte
MAYOU.
In re
EDWARDS-
WOOD.



1864.

Nov. 16, 23.

1865.

Mar. 25.

Before The
Lord
Chancellor
Lord

WESTBURY.

A surety for a debt of a joint stock company paid the debt after the date of an order for winding up the company under the Joint Stock Companies Acts 1856 and 1857. Among the securities for the debt in the hands of the creditor, was a promissory note of the company,—*Held*, that the surety was entitled to set off against a debt due from him to the company an equal amount of the money due from the company on the promissory note.

In the Matter of THE JOINT STOCK COMPANIES ACTS, 1856 and 1857; and

In the Matter of THE MOSELEY GREEN COAL AND COKE COMPANY LIMITED.

BARRETT'S CASE (No. 2).

THIS was an appeal by *Osman Barrett*, who, under the decision reported above (a) of the Lord Chancellor, had been settled as a contributory of *The Moseley Green Coal and Coke Company Limited*, (a company which was being wound up under the above-mentioned Acts in the Court of Bankruptcy,) from the refusal of Mr. Commissioner *Goulburn* to allow the Appellant to set off against the amount of a call of 1,000*l.* made against him in the winding-up an equal amount of a sum of 7,000*l.* due to the Appellant upon the promissory note of the company.

In *January*, 1861, the company had entered into a contract for the purchase of certain mines upon which there was a mortgage of 7,000*l.* The Appellant was a surety

(a) Page 259.

July 22.
Before The
Lord
Chancellor
Lord
CRANWORTH.

A contributory of a joint stock company (which was being wound up under the Acts of 1856 and 1857), in respect of shares purchased in his name by another,—*Held*, not entitled to set off against a demand of the company the amount due from the company upon its promissory notes made in favor of the person who was the real purchaser of the shares, and who had, after the date of the winding up order, indorsed and deposited the notes with the nominal purchaser's solicitors as an indemnity in respect of his liability on the shares.

a surety to the mortgagee for the payment of the mortgage money. By a deed between the company and the mortgagor, who was their vendor, the company contracted to pay off the mortgage on *May 7th, 1862*.

This contract the company failed to perform, and in consequence of that failure the mortgagee required the company to give, and the company did, on the 5th of *September, 1862*, with the assent of the Appellant as surety, accordingly give to the mortgagee their promissory note for 7,000*l.*, being the amount due to him, payable in *March, 1863*.

At the date of the winding-up order in *October, 1862*, the mortgagee was the bonâ fide holder of the note.

On the 23rd of *February, 1863*, the Appellant's sister paid off the mortgage, and took from the mortgagee a transfer of his security, and at the same time the promissory note in question was indorsed and delivered over to her. On *June 13th, 1864*, she agreed with the Appellant to transfer the mortgage security to him, and at the same time to hand over to him the promissory note, in consideration of receiving from him his own promissory note. This agreement having been carried into effect, the Appellant claimed before the Commissioner, and now under appeal, credit for the company's note in his account with them.

Mr. *Cole* and Mr. *C. T. Swanston* appeared for the Appellant; and

Mr. *Willcock* and Mr. *Roxburgh* for the official liquidator in support of the judgment of the Court below.

In the course of the argument the *Joint Stock Companies Amendment Act, 1858* (Stat. 21 & 22 *Vict. c. 60*, s. 17),

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s. 17), the provisions of which are set out below (a); *Hawkins v. Whitten* (b); *Collins v. Jones* (c); *Ex parte Stephens* (d); *Marsh v. Chambers* (e); *Dickson v. Evans* (f); *Ex parte Hale* (g), and *Ex parte Blagden* (h), were referred to.

The LORD CHANCELLOR said that one question was, whether the agreement between the Appellant and his sister was a dealing and transaction then for the first time created and made, or whether the Appellant, in respect of his antecedent suretyship for the 7,000*l.* due to the mortgagee, was entitled, by paying off the charges, to claim the benefit of the possession of the mortgagee's securities.

His Lordship was at present disposed to attribute the payment made by the Appellant to his sister, the assignee of the mortgage, to that liability to the mortgagee which the Appellant had originally contracted as a surety prior to the date of the winding-up order.

His position appeared to his Lordship to be that of a person who, being surety to a creditor of a company prior to the order for winding it up paid the debt, after that order was made, in respect of that suretyship, and

(a) "In fixing the amount payable by any contributory, in pursuance of the Joint Stock Companies Acts, or any of them, he shall be debited with the amount of all debts due from him to the company, including the amount of the call, and shall be credited with all sums due to him from the company on any independent contract or dealing between him and the company, and the balance, after making such debit and credit as afore-

said, shall be deemed to be the sum due."

As to the question of set-off in connection with limited companies under the Companies Act, 1862, see *Grissell's Case*, *L. R.*, 1 *C. A.* 528.

(b) 10 *B. & C.* 217.

(c) *Ibid.* 777.

(d) 11 *Ves* 24.

(e) 2 *Stra.* 1234.

(f) 6 *T. R.* 57.

(g) 3 *Ves.* 304.

(h) 19 *Ves.* 465.

and thereby became entitled to the benefit of the securities in the hands of the creditor, among which securities there happened to be a promissory note of the company validly and duly given; and the question was, whether he was or was not entitled, in respect of the holding or the ownership of that promissory note, to set it off against a demand that might be made against him by the company.

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His Lordship at present thought that the Appellant's position in this respect was precisely the same as if he had been the holder of the note at the time when the winding-up order was made; and if the Appellant were remitted to that position, his claim to set-off was referable to a state of things existent at the date of the winding-up order, and not to a state of things arisen out of any contract or dealing which had taken place subsequently to the winding-up order.

His Lordship would hear counsel on this one point when they had had time to look further into the authorities. He decided now that the contract was within the power of the company, and that they had power to give the promissory note: the matter to stand over for a week, and to be then mentioned again.

The matter was accordingly on this day again mentioned, and the cases of *Collins v. Jones* (a), and *Ex parte Stephens* (b), were again referred to: and further reference was made to *Dobson v. Lockhart* (c).

Nov. 23.

The LORD CHANCELLOR said that the official liquidator could not contend that if the Appellant had been the holder of the note at the date of the winding-up order,

(a) 10 B & C. 777. (b) 11 Ves. 21. (c) 5 T. R. 133.

1864.

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In re
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order, he would not have been entitled to set-off its amount against the company's claim against him. It would be an injurious thing under a winding-up order, as it had been held to be an injurious thing in bankruptcy, that a debtor to the estate should be permitted subsequently to the winding-up order, or subsequently to a bankruptcy, to purchase up claims upon the estate for the purpose of making a case of set-off; but the question really was, whether there was not a substantial exception to that principle in a case where, as here, there was an actual ownership of a counter claim, which, though constituted subsequently to the winding-up order, yet was the result of a liability incurred or of a contract entered into antecedently to the bankruptcy or the winding-up order. That distinction was recognised in some of the cases cited, and particularly in *Collins v. Jones (a)*. Then came the material question, did the contract of suretyship entered into, as it had been, by the Appellant prior to the date of the winding-up order, with its attendant rights, give such retrospective operation to the Appellant's possession and ownership of the note as to entitle him to refer it to that contract? His Lordship's present impression was that it did; and that, as the Appellant had got possession of the note as the legitimate consequence of a bonâ fide contract of suretyship made anterior to the winding-up order, he was a bonâ fide possessor of the note, and therefore had the right of set-off against the demand of the company. His Lordship said, that if he retained this impression, what he had said must be taken as the expression of his opinion. If his Lordship changed his view he would hear Mr. Cole.

1865.
March 25.

On this day the matter was again mentioned, and the LORD CHANCELLOR said that the impression which he

(a) 10 B. & C. 777.

he had previously formed remained unchanged, and directed the order to be drawn up.

The order not having yet been finally settled, the Appellant now, in pursuance of leave granted for that purpose, moved, before the Lord Chancellor Lord *Cranworth*, that the order made by the Lord Chancellor Lord *Westbury* might be varied by declaring the Appellant entitled to set-off against the 1,000*l.* call the principal money due on two other promissory notes, each for 500*l.*, instead of that due on the promissory note for 7,000*l.*, and that, so far as might be necessary for that purpose, the appeal might be reheard.

As appears by a reference to the report of the case in its earlier stage above (*a*), the Appellant was a trustee of the shares in respect of which he had been placed on the list of contributories for the vendor of the mines; and this gentleman had, after the date of the winding-up order, deposited the notes now in question with the Appellant's solicitors to indemnify the Appellant in respect of his liability, if any, on the shares. The notes were those of the company given against part of the purchase-money to the vendor. They were both dated the 6th of *March*, 1862, and were made payable at eighteen and twenty-four months after date respectively, and they were both indorsed by the vendor when deposited with the Appellant's solicitors.

Mr. *Cole* and Mr. *C. T. Swanston*, for the Appellant, contended that, as the Appellant held the 500*l.* notes in respect of a liability incurred antecedently to the winding-up

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(*a*) *Supra*, p. 259.

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winding-up order, the case was governed by the Lord Chancellor Lord *Westbury's* decision as to the 7,000*l.* promissory note.

Mr. *Willcock* and Mr. *Roxburgh*, for the official liquidator, contended that it was not; the antecedent liability not having been incurred on behalf of the company as it had been in the other case.

Mr. *Cole*, in reply, contended that the authorities in bankruptcy as to set-off had no application in a case of winding-up.

The authorities referred to were the same as those referred to on the prior hearing.

The LORD CHANCELLOR (LORD CRANWORTH).

The winding-up of a company only takes place when the company has become insolvent, and the principle is the same as that which exists in bankruptcy. What the Appellant is here in reality contending for is the right to payment in full, whilst the other creditors of the company have not been paid 5*s.* in the pound.

Lord *Westbury's* decision went upon a principle plainly inapplicable to the case of these notes. In the case before him, the Appellant, previously to the date of the winding-up order, was surety for the company, and the Lord Chancellor held that to be the same thing as if the company were indebted to him. Then the company being indebted to the Appellant in a sum of 1,000*l.*, and the Appellant being indebted to the company in a sum of 1,000*l.*, the Lord Chancellor, considering that the company was in equity liable to pay the Appellant, allowed the set-off.

But

But in respect of the two sums of 500*l.* now in question, there was no debt or liability from the company to the Appellant. The relation of trustee and cestui que trust might have existed between the Appellant and the company's vendor, but as between the company and the holders of these notes the latter was a complete stranger, and it would be most mischievous if a person were enabled thus to satisfy the demands against him by purchasing up debts due from the company.

1865.

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 GREEN COAL
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So far, therefore, as these two notes are concerned, the Appellant in my judgment stands precisely in the situation in which every other creditor stood at the time when the winding-up order was made. I assent to what fell from Lord *Westbury* on the former occasion, but I think that the principle of his decision does not apply to these notes, and I therefore refuse this application with costs.

The order accordingly, as finally drawn up, declared that the Appellant was entitled to set off against the 1,000*l.* mentioned in the Commissioner's order an equal amount of 1,000*l.* due on the promissory note for 7,000*l.* made by the company and dated the 5th of *September*, 1862, and that to the extent of the sum so set off the mortgage mentioned in the proceedings in these matters was to be deemed satisfied (*a*).

(*a*) *Reg. Lib. Vol.* 20, *p.* 181.

AN
I N D E X
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ACKNOWLEDGMENT.

See STATUTE OF LIMITATIONS.

ACT OF BANKRUPTCY.

An assignment of the principal part of the assignor's property may be an act of bankruptcy, although not executed by the assignor spontaneously, if it appear that the provisions of the deed must necessarily have the effect of delaying and defeating the assignor's creditors. And where such an assignment was made to trustees, one of whom was an accountant employed with a view to and under the assignment, upon trust out of the proceeds of the assigned property in the first place to pay all costs, charges and expenses due or to become due to the

assignor's solicitor, and the professional charges of the accountant-trustee, and other expenses, and subject thereto to divide the proceeds rateably among the creditors who should execute the deed, and the deed recited that the assignor was not prepared to pay his debts in full:—*Held*, that the necessary effect of the deed was to defeat and delay the creditors, and that it was an act of bankruptcy. *Ex parte Wensley, In re Wensley.*

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See ARRANGING DEBTOR, 4.

EVIDENCE, 2, 3.

ADJUDICATION.

See ANNULLING.

EVIDENCE, 3.

AFFIDAVIT.

See ARRANGING DEBTOR, 9, 10.

ALLOWANCE.

1. A deed for the benefit of creditors operating under the Bankruptcy Act, 1861, s. 192, is to be looked upon in the light of a contract between the debtor and his creditors, and stipulations not made by the parties themselves cannot be imported into it by the Court.

Therefore if it is intended that an allowance shall be made to the debtor out of the net produce of the realization of his estate in proportion to the amount of dividends yielded by it, a stipulation to that effect must be inserted in the deed, and cannot be imported into it under the Bankrupt Law Consolidation Act, 1849, s. 195, by any incorporation with the deed of the provisions of the Bankruptcy Act, 1861, s. 197.

To obtain an allowance under the 195th section of the Act of 1849, a bankrupt must not only have a sufficient estate but must also have obtained his certificate. *Ex parte Gibbins, In re Gibbins' Trust Deed.* Page 196

2. The power given to the Court of Bankruptcy by the Bankrupt Law Consolidation Act, 1849, s. 194, of making an allowance to a bankrupt out of his estate for the support of himself and his family prior to his passing his last examination, still exists, subject only to be displaced by the exercise by a majority of creditors present at

the first meeting after adjudication of the controlling power given by the Bankruptcy Act, 1861, s. 109. *Ex parte Ellerton, In re Leech.*

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ANNULLING.

1. An application to annul an adjudication of bankruptcy made by a bankrupt, whether before or after the time has elapsed for showing cause against the adjudication under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 104, is an appeal from the order of adjudication, and is properly made by way of motion to the Court of Appeal at any time within the limit of two months specified in the 233rd section of the act, as amended by the Bankruptcy Act, 1854 (17 & 18 Vict. c. 119), s. 24.

Circumstances under which the Court of Appeal allows new evidence to be adduced. *Ex parte Miller, In re Miller.* 229

2. An appeal by the bankrupt from a refusal of a Commissioner to annul an adjudication of bankruptcy obtained in England by residents in Scotland, as petitioning creditors, against a trader whose trade was wholly in Scotland, was directed to stand over, with liberty to the bankrupt to bring an action to try the validity of the adjudication. On the failure of the petitioning creditors to appear to the action within a time limited by the Court for the purpose, the Court annulled the adjudication.

Pending the proceedings the goods of the Appellant seized by the messenger had been sold by arrangement:—*Held*, that the official assignee was entitled to deduct from moneys received by him from the sale moneys expended in warehousing and selling the goods, but not his costs of proceedings in Court; the Court directing that these should be paid by the petitioning creditors, who, like the official assignee, were Respondents to the petition, and ordering that the petitioning creditors should pay to the bankrupt the moneys to be deducted by the official assignee. *Ex parte Wollheim, In re Wollheim.* Page 223

See ARRANGING DEBTOR, 1.

COSTS, 4.

EVIDENCE, 3.

APPEAL.

The twenty-one days from the date of a decision or order of the Court of Bankruptcy within which, according to the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 12, an appeal from such decision or order must be entered, date from the day when the decision or order sought to be appealed from is pronounced, and not from that on which it is drawn up, although the latter date appears on the order. *Ex parte The Dudley and West Bromwich Banking Company, In re Hopkins.* 236

See ANNULING, 1.

COSTS, 1, 2, 3.

EVIDENCE, 1.

EXAMINATION, 2.

ARRANGING DEBTOR.

1. A conditional assent on the part of a creditor to a deed intended to operate under the 192nd section of the Bankruptcy Act, 1861, cannot, so long as the condition remains unfulfilled, be reckoned in calculating the statutory majority of creditors mentioned in the first of the conditions specified in that section.

Per L. J. *Knight Bruce*.—The question whether all those conditions have been complied with may be raised, notwithstanding the certificate of registration, and without setting it aside.

Per L. J. *Turner*.—The 192nd section extends to deeds of composition, although there may be no *cessio bonorum*. But the composition must be with all the creditors; and where a deed recited an agreement that sureties, parties to the deed, should pay the creditors a specified money composition to be accepted in discharge of the debts by instalments, and the delivery to the creditors, parties to the deed, of promissory notes for securing the instalments; and the creditors, parties to the deed, covenanted that the composition should be accepted in discharge of their respective debts, the amounts of which were specified in the schedule to the deed:—*Held*, per L. J. *Turner*, that the composition was not with all the creditors, there being no means afforded to non-assenting creditors of obtaining payment of the com-

position, or any note for securing such payment.

Per *L. J. Knight Bruce*.—Where there is only a doubt as to the validity of an adjudication, the proper course still is not to annul. *Ex parte Rawlings, In re Rawlings*. Page 1

2. The word "creditors" in the first condition specified in the 192nd section of the Bankruptcy Act, 1861, means and extends to creditors holding security, good or bad, sufficient or insufficient, as well as creditors wholly without security; and in reckoning the proportion of assenting creditors under that section, the debts due to secured as well as unsecured creditors must be taken into account.

Per *L. J. Knight Bruce*.—It is not necessary to apply to set aside the registration and certificate of registration of a deed intended to operate under the 192nd section of the Bankruptcy Act, 1861, before questioning the fulfilment of the conditions imposed by that section.

Per *L. J. Turner*.—In order to be binding on all the creditors under the provisions of the 192nd section of the Bankruptcy Act, 1861, composition deeds must extend to all the creditors.

Semble, per *L. J. Knight Bruce*, that under the Bankruptcy Act, 1861, the Court of Bankruptcy has jurisdiction to discharge out of custody a debtor who, after having executed a deed of composition in conformity with

the 192nd section, is arrested by a creditor without the leave of the Court of Bankruptcy. *Ex parte Godden, In re Shettle*.

Page 36

3. To the validity under the Bankruptcy Act, 1861, s. 192, of a composition deed executed by a single member of a dissolved firm after the dissolution, objection was taken on the part of creditors of the firm on the ground that the joint creditors were insufficiently represented in the computation of the majority of assenting creditors required by the statute.—*Held*, that the objection could not be entertained in the absence of evidence showing the existence of joint estate at the date of the execution of the deed, and that the onus lay upon the objectors to produce such evidence.

An assignment of a debtor's estate and effects is not necessary for the validity of a composition deed under the 192nd section of the Bankruptcy Act, 1861, but to render such a deed binding on non-assentients, they must stand under the deed in the same situation and with the same advantages as the assentients.

A composition deed purported to be made between a debtor of the first part, certain creditors whose names and seals with the amounts of their debts were set forth in a schedule, and who executed the deed, of the second part, and all other (if any) the creditors of the debtor of the third part.

It recited that the executing creditors had agreed to accept a composition of three pence in the pound on their debts and to release the debtor. It witnessed, that in consideration of the composition paid to the executing creditors and of the covenant thereafter mentioned, the executing creditors released the debtor from the debts placed opposite to their names. It further witnessed, that the debtor covenanted with the parties of the second and third parts to pay on demand to all his creditors the above composition unless it should have been already paid :—*Held*, that the deed placed the assentients and non-assentients in a position of undue inequality, and that on this ground the deed was not binding on the latter. *Ex parte Cockburn, In re Smith and Laxton.* Page 113

4. The registration of trust deeds under the 192nd and under the 194th sections of the Bankruptcy Act, 1861, although in practice performed by the same officer, are distinct, and have different operations ; and where, for the want of the papers required by the orders, registration under the former section had been refused by the officer, and the applicant had registered the deed under the 194th section :—*Held*, that the registration did not prevent the deed, which was an assignment of all the debtor's property, from being an act of bankruptcy.

The 192nd section applies only

to deeds which contain provisions for the benefit of all the debtor's creditors, and this requisite is not fulfilled by a deed, the trusts of which are for the benefit of such of the debtor's creditors as shall execute the deed within a limited time.

Seemle, that a deed, to be entitled to the benefit of the provisions of the 192nd section, need not comprise the whole of the debtor's property.

Seemle also, that the creditors under a trust deed are placed *in eodem statu* with creditors under a bankruptcy, and that as the latter cannot prove without allowing for the value of their securities, the former are subjected to the same obligation. *Ex parte Morgan, In re Woodhouse.*

Page 64

5. A trust deed for the benefit of creditors intended to be executed by debtors in business together as copartners and to be brought within the provisions of the Bankruptcy Act, 1861, s. 192, is properly framed when its terms embrace all possible estate and property which not only does but also may or might belong to the partners jointly, or to either of them separately.

The non-existence in point of fact of any separate estate of either debtor is no objection to the validity under the Bankruptcy Act, 1861, s. 192, of a trust deed so framed, even as against a non-assentient separate creditor.

Seemle, that in computing the statutory majority of assenting creditors to a deed under the Bankruptcy Act, 1861, s. 192, executed by debtors in trade in copartnership, the separate creditors are not to be consulted separately in respect of the separate estate, but that the whole body of the creditors is to deliberate and decide together, and that separate creditors might constitute a majority, even if there were no separate estate. *Ex parte Oldfield*, *In re Oldfield*. Page 188

6. Where an application had been made in Chambers to a judge of a Court of Law for the release from custody under a ca. sa. of a debtor who had previously to his arrest registered a deed purporting to be a deed under the Bankruptcy Act, 1861, s. 192, and obtained thereon the Chief Registrar's certificate under s. 198, and the judge had decided that the deed was not within the provisions of the 192nd section of the Bankruptcy Act, 1861:—*Held*, that the Court of Bankruptcy had properly refused to release the debtor.

The proper course in such a case is to apply to the Court out of which the judgment issued.

Whether the Court of Bankruptcy would have had jurisdiction if the deed had been valid within the 192nd section of the Bankruptcy Act, 1861, *quære*.

In calculating the statutory majority of assenting creditors required under the Bankruptcy Act,

1861, s. 192, to render a deed under that section binding on non-assenting creditors, secured creditors must be taken in account in the computation of the number of creditors constituting the majority.

But *seemle*, that the amounts of their securities should be deducted in calculating the majority on the question of value. *Ex parte Smith*, *In re Smith's Trust Deed*. Page 156

7. A trust deed for the benefit of creditors, containing provisions for the application of the whole of the estate of the debtor in payment of his debts as in bankruptcy, contained a clause, purporting to empower the trustee to pay or make such arrangements with the creditors whose debts were under 10*l.*, and to pay the costs, if any, of the creditors proceeding against the debtor for the recovery of their debts, as the trustee might deem expedient:—*Held*, that the clause did not, in either of its branches, prevent the deed from binding non-assenting creditors under the Bankruptcy Act, 1861, s. 192; not in the former branch, as it only purported to give a power which, being repugnant to the rest of the deed and the law, could not be exercised; nor in the latter, as that branch might afford the means of preserving the assets for equal distribution amongst the creditors.

Seemle, that the whole effect of the 197th section is to give to

a trust deed when duly registered a comprehensive effect upon all the estate and effects of the debtor comprised in the deed, and the particular operation of making the position and relative rights of the trustees and creditors claiming under it the same as the rights of assignees and creditors under an adjudication in bankruptcy.

Semble also, that secured creditors under such a deed rank for the amount remaining after deduction of the value of their securities.

Semble also, that the words in the 197th section, "except where the deed shall expressly provide otherwise," refer to the insertion in the deed of a proviso for questions being settled by arbitration, or for the adoption of some different rule of administration from that adopted in bankruptcy, as, for example, with respect to joint and separate creditors. *Ex parte Spyer, In re Josephs' Assignment.* Page 94

8. The date of a trust deed in the form set out in Schedule (D.) to the Act of 1861, is that of the supposed adjudication to which the 197th section refers. *Ex parte Mendel, In re Moor's Assignment.* 106

9. The affidavit required by the Bankruptcy Act, 1861, s. 200, should state with particularity the matters to which it is directed. *Ex parte Groome, In re Groome's Trust Deed.* 187

10. An affidavit made in support of

an application to dispense with the requirements of the Bankruptcy Act, 1861, s. 192, on the ground that the circumstances of the case are within the 200th section of the act, must show such circumstances with greater certainty than by merely stating that the deponent is informed and verily believes them to be as stated. *Ex parte Dobson, In re Anderson's Trust Deed.* Page 167

See ACT OF BANKRUPTCY.

ALLOWANCE.

COSTS, 4.

EVIDENCE, 3.

EXAMINATION.

FRAUD ON ACT OF PARLIAMENT.

REGISTRATION.

ARREST.

See ARRANGING DEBTOR, 2, 6.

ARTICLES.

See PARTNERSHIP, 1.

ASSENT.

See ARRANGING DEBTOR, 1.

ASSENTING CREDITORS.

See ARRANGING DEBTOR, 3, 5, 6.

SECURED CREDITORS.

MAJORITY.

ASSIGNEES.

See COSTS, 1, 2, 3.

MORTGAGE.

ASSIGNMENT.

See ACT OF BANKRUPTCY.

ARRANGING DEBTOR, 8.

EVIDENCE, 2, 3.

AUTHORITY.

See PARTNERSHIP, 4.

BANKER.

See PARTNERSHIP, 4.

BLOCKADE.

A joint adventure between the subjects of a neutral power for running a blockade established by one of two foreign belligerents against the ports of the other with a cargo of arms and ammunition is not an unlawful contract, but one from which the ordinary rights of property result.

International law subjects a neutral merchant who transports contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined; but the commerce which was lawful for the neutral with either belligerent country before the war is not made by the war unlawful or capable of being prohibited by both or either of the belligerents.

If a British shipbuilder builds a vessel of war in an English port, and arms and equips her for war *bonâ fide* on his own account as an article of merchandise, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship so armed and equipped for sale as merchandise in a belli-

gerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act (59 *Geo.* 3, c. 69).

The object of a proclamation is to make known the existing law, and it can neither make nor unmake law. *Ex parte Chavasse, In re Grazebrook.* Page 329

BOOKS OF COMPANY.

See CONTRIBUTORY, 3.

BUILDING ACTS.

The 83rd section of the 14 *Geo.* 3, c. 78, is of universal and not of locally circumscribed application, but only applies to insurance moneys upon houses and buildings.

Moneys paid in respect of the insurance of trade fixtures are not within its application. *Ex parte Gorely, In re Barker.* 265

CALL.

See SET-OFF.

CERTIFICATE.

See REGISTRATION, 1.

COMPANY.

See CONTRIBUTORY.

ORDER AND DISPOSITION.

SET-OFF.

COMPOSITION DEED.

See ARRANGING DEBTOR, 1, 2, 3.

CONDITIONAL ASSENT.

See ARRANGING DEBTOR, 1.

CONSTRUCTION.

See BUILDING ACTS.

CONTRIBUTORY.

1. Directors of a company registered in 1860 took a transfer of paid-up shares from an allottee who had had them allotted to him by the company in part payment of purchase-money in respect of property purchased by the company. The same directors were holders of other paid-up shares taken by them for attendance fees. The validity of the purchase in the one case, and the allowance of attendance fees in the other, were impugned:—*Held*, that the transactions could not be affirmed in part and repudiated in part, and that consequently the directors, if treated as shareholders at all, must be treated as paid-up shareholders, and not placed on the list of contributories in either case.

Prior to the formation of the company the directors in question had agreed each to take 100 shares in the company, and to execute the articles and memorandum of association when ready and to act as directors of the company, and the articles provided that the subscribers of the memorandum should be deemed to be directors until others were appointed, and that each director should hold at least 100 shares:—*Held*,

(1.) That their obligation to take the qualification shares could

not be satisfied by their taking the unpaid-for shares.

(2.) That the case was distinguishable from *Lord Abercorn's Case, In re The National Insurance and Investment Association*, 4 De G., F. & J. 78.

(3.) That the directors were liable to be put on the list as contributories for their respective qualification shares.

(4.) That they were also liable to be put on the list as contributories in respect of the shares for which they had respectively subscribed the memorandum of association, but that these were to be taken as part of the qualification shares. *In re The Great Northern and Midland Coal Company (Limited), Currie's Case.*

Page 201

2. Shares in a joint-stock company were allotted to and registered in the name of a person on the application in his name of another person to whom the former had lent the use of his name for the purpose, on condition that he was to be exposed to no liability in consequence, and who paid the deposit on the shares. The company being subsequently ordered to be wound up under the Acts of 1856 and 1857, and nothing having been done which could bind the company towards releasing the registered shareholder from his liability:—*Held*, that whatever equities in the shape of right to indemnity might exist between him and the person applying in his name and the directors who

had entered into an arrangement for his release, which was ultra vires and had not been sanctioned by the company, his name was properly placed on the register and list of contributories. *In re The Moseley Green Coal and Coke Company Limited, Barrett's Case.* Page 259

3. Where a person's name appeared as that of a shareholder in a joint stock company's register, and minute and other books, and had been so included in the yearly returns to the registrar of joint stock companies, but it appeared on the evidence that he had never agreed, or acted in such a manner as to induce others to believe that he had agreed, to become a shareholder in the company, and that he had promptly repudiated an attempt on the part of the secretary of the company to place him in the position of a shareholder:—*Held*, that upon an application in Chancery under the Joint Stock Companies Act, 1856, s. 25, and in bankruptcy in the matter of the winding-up to remove his name from the register and from the list of contributories, he was entitled to the relief sought.

The books of a company are, under the Joint Stock Companies Act, 1856, s. 40, only evidence as between shareholders, and cannot be accepted as evidence on the question whether a person is or is not a shareholder. *In re Moseley Green Coal and Coke Company Limited, Fox's Case.* 245

4. The liability of a contributory

under the Companies Act, 1862, s. 75, commences at the date when he enters into the contract under which he becomes a member of the company which is being wound up. *Ex parte Canwell, In re Vaughan.* Page 295

See SET-OFF.

CONVERSION.

See FRAUDULENT DEED.

COSTS.

1. Where, upon the application of the solicitor for the assignees, the Court below made an order which it had no jurisdiction to make, the Court of Appeal ordered the assignees personally to pay the costs. *Ex parte Cole, In re Attwater.*

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2. Assignees in bankruptcy may in a proper case be ordered to pay costs personally, and not be allowed them out of the bankrupt's estate, notwithstanding they act pursuant to a resolution of creditors. *Ex parte Watts, In re Attwater.* 228

3. The costs of an official assignee, who appears by counsel on the hearing of an appeal merely to consent to the reversal of the order, ought not to be allowed out of the estate. *Ex parte Churchill, In re Griffiths.* 222

4. The Court has no jurisdiction, under a deed in the statutory form given in Schedule (D) to the Bankruptcy Act, 1861, and executed by a debtor, to make an order upon the trustees of the deed for payment out of the estate

in their hands of a petitioning creditor's costs of an adjudication of bankruptcy against the debtor, made after the execution of the deed but subsequently annulled in consequence of the registration of the deed under the Bankruptcy Act, 1861, s. 192. *Ex parte Jones, In re M'Turk.*

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See ANNULLING, 2.

CREDITORS.

See ARRANGING DEBTOR, 3, 5, 6.

COSTS, 4.

FRAUD ON ACT OF PARLIAMENT.

MAJORITY.

SECURED CREDITORS.

CUSTODY.

See ARRANGING DEBTOR, 2.

DAMAGES.

See PROOF.

DATE.

See ARRANGING DEBTOR, 8.

DEBT.

See MAJORITY.

PROOF.

DEBTOR AND CREDITOR.

See ACT OF BANKRUPTCY.

ALLOWANCE.

ARRANGING DEBTOR.

COSTS, 4.

EVIDENCE, 3.

SECURED CREDITORS.

DEED.

See ACT OF BANKRUPTCY.

ALLOWANCE.

ARRANGING DEBTOR.

COSTS, 4.

EVIDENCE, 2, 3.

EXAMINATION.

FRAUD ON ACT OF PARLIAMENT.

REGISTRATION.

STATUTE OF LIMITATIONS.

DIRECTORS.

See CONTRIBUTORY.

DISCHARGE.

In considering the question of a bankrupt's discharge with reference to the provisions of the Bankruptcy Act, 1861, s. 159, rule 3, care, and even some amount of severity, is properly brought to bear by the tribunal which has to decide the question.

The debts, the contracting of which by the bankrupt, without reasonable or probable ground of expectation of being able to pay the same, is made condemnatory by the section and rule in question, must be debts incurred by the bankrupt, and within the scope of the existing proceedings in bankruptcy.

In construing the words "rash and hazardous speculation" in the same section and rule, "rash" is the important word, that is to say, the speculation made condemnatory by the section and rule must be such as no reason-

ably prudent man would have entered into.

Circumstances under which a bankrupt was held, within the meaning of the section and rule above mentioned, neither to have contracted debts without reasonable or probable ground of expectation of being able to pay the same, nor to have been guilty of rash and hazardous speculation conducing to his insolvency, nor of unjustifiable extravagance in living. *Ex parte Downman, In re Downman.* Page 251

DISCHARGE FROM CUSTODY.

See ARRANGING DEBTOR, 2, 6.

DISCLAIMER.

See MORTGAGE.

DIVIDEND, REFUNDING.

See INTEREST.

EVIDENCE.

1. The 32nd of the General Orders in Bankruptcy of 6th November, 1861, providing that no new evidence shall be received on any appeal, unless the Court of Appeal shall, on the hearing thereof, so direct, applies to evidence upon the matters in issue, and not to evidence as to what took place in the Court below.

In the former case some ground must be shown for the admission of the new evidence.

It is not necessary that a notice of motion by way of appeal, on the ground, among others, of the rejection of evidence should state that ground. *Ex parte Page, In re Neal.* Page 59.

2. An assignment of the principal part of the assignor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, although not registered under the Bankruptcy Act, 1861. *Ex parte Wensley, In re Wensley.* 49
3. An instrument purporting to be a deed of assignment of all a debtor's estate and effects for the benefit of his creditors, and signed by the debtor, is inadmissible as evidence of an act of bankruptcy on his part, if unstamped. *Ex parte Wensley (supra, 49)* doubted.

Remarks as to the nature of the case which should be made by a creditor of a bankrupt who seeks (by petition) without the consent of any party interested to annul an adjudication made on the bankrupt's petition, and to obtain an adjudication of his own relating to an act of bankruptcy earlier than the debtor's petition. *Ex parte Potter, In re Barron.* 178

See ANNULING, 1.

CONTRIBUTORY, 3.

REGISTRATION, 1.

EXAMINATION.

1. Trustees and creditors under a trust deed operating under the Bankruptcy Act, 1861, s. 192, and

duly registered, are entitled to the same powers, rights and privileges as are possessed by assignees and creditors under an adjudication in bankruptcy, including the power of summoning witnesses.

Semble, that the jurisdiction of the Court of Bankruptcy to summon persons under the 197th section of the Act of 1849, for the purposes of discovery, should be exercised with care, circumspection and judicial discretion, and not in a merely ministerial way. *Ex parte Alexander, In re Thin and Flett's Trust Deed.* Page 87

2. The commissioner has power either under the 136th section of the Bankruptcy Act, 1861, or irrespectively of that section by virtue of his authority over the trustee appointed by a trust deed within the act, to direct the trustee to be examined as to his dealings with the debtor's estate; and although it will be a good practice not to direct such examination without some ground being shown for it, the Court of Appeal will not in general entertain an appeal as to the sufficiency of such ground. *Ex parte Lawrence, In re Beale's Assignment.* 83
3. Where a debtor has executed a deed under the Bankruptcy Act, 1861, s. 192, any creditor, although denying the validity of the deed, is entitled to examine the bankrupt. But such creditor must submit to the jurisdiction in bankruptcy. *Ex parte Brooks, In re Brooks.* 150

EXECUTION.

See REGISTRATION, 2.

FIXTURES.

See BUILDING ACTS.

FOREIGN ENLISTMENT ACT.

See BLOCKADE.

FRAUD.

See PARTNERSHIP, 4.

FRAUD ON ACT OF PARLIAMENT.

Where a debtor, being sued by a creditor on a dishonoured bill of exchange, and having no present assets, and only the deferred possibility of the accruer of a trifling sum on a balance of accounts between the debtor and his late partners, such possibility being dependent upon the result of legal proceedings taken by the partners to obtain relief against payments made by them, executed a trust deed in the form given in Schedule (D) to the Bankruptcy Act, 1861, which was registered under the 192nd section of that act:—*Held*, that the deed was invalid as a fraud upon the act, and that a dissentient creditor ought to have leave to issue process against the debtor, notwithstanding the registration of the deed. *Ex parte Morrison, In re Clunn's Trust Deed.* Page 170

FRAUDULENT DEED.

A partnership of two was dissolved, the outgoing partner assigning to the continuing partner all his share in the partnership assets, and the latter covenanting to pay the partnership debts. At the date of the assignment the firm was insolvent, as was also each of the partners. The firm being shortly afterwards adjudged bankrupt:—*Held*, that the transaction was void; that it did not operate as a conversion of the outgoing partner's property into the separate estate of the continuing partner; and that the whole of the property, as it existed, belonging to the bankrupts at the date of the assignment, must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors. *Ex parte Mayou, In re Edwards-Wood*. Page 338

GENERAL ORDERS.

See EVIDENCE, 1.

HUSBAND AND WIFE.

See MORTGAGE.

ILLEGAL DEALING.

See BLOCKADE.

IMPRISONMENT.

See ARRANGING DEBTOR, 2.

INEQUALITY.

See ARRANGING DEBTOR, 3.

INSPECTORSHIP DEED.

See STATUTE OF LIMITATIONS.

INSURANCE.

See BUILDING ACTS.

INTEREST.

The language of the orders of the Court of Bankruptcy must be construed with reference to the settled rules of the Court; and it being the settled practice of the Court, that where a security consists of an equitable mortgage, and the mortgagee, after a bankruptcy, presents a petition for the realization of the security, he is not entitled to any interest subsequent to the date of the fiat:—*Held*, that where securities, by way of equitable mortgage, comprised joint property of bankrupt partners, separate property of one partner and property of a stranger, and the mortgagees being joint and separate creditors elected to prove against the separate estates, an order made on their petition, and directing an account of principal and interest due to them without express limitation of the calculation of the interest to interest due at the date of the fiat, did not entitle them to a calculation of, or to retain out of the proceeds of the securities, interest subsequent to the date of the fiat.

Dividends paid upon an erroneous principle ordered to be re-

funded after a considerable lapse of time and change of circumstances. *Ex parte Lubbock, In re Flood.* Page 272

JOINT AND SEPARATE ESTATE.

See ARRANGING DEBTOR, 5.
FRAUDULENT DEED.
INTEREST.
PARTNERSHIP, 2.

JURISDICTION.

See ARRANGING DEBTOR, 2, 6.
COSTS, 1, 4.
EXAMINATION.
REGISTRATION, 2, 3.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

MAJORITY.

The debt of a non-assenting creditor entered by the debtor in the schedule of debts required by the General Orders in Bankruptcy of 22nd May, 1862, but therein marked "disputed," cannot, in the absence of the creditor, be disregarded in calculating the statutory majority of assenting creditors. *Ex parte Middleton, In re Middleton.* 139
See ARRANGING DEBTOR, 1, 5, 6, 7.
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METROPOLITAN BUILDINGS.

See BUILDING ACTS.

MISDEMEANOR.

Mere suspicion of the commission of one of the offences described in the Bankruptcy Act, 1861, s. 221, is not sufficient to warrant a direction for the prosecution of a bankrupt for misdemeanor. *Ex parte Still, In re Still.* Page 216

MORTGAGE.

A husband and wife mortgaged in fee land of which they were seised in right of the wife, to whom the equity of redemption was reserved by the mortgage deed. The husband became bankrupt, and in a suit by the wife for a settlement of the equity of redemption on her and her children, and for redemption as against the mortgagee, and for foreclosure against the assignees and the husband, the assignees disclaimed, and a decree was made giving the wife the right to redeem as against the mortgagee and settling the whole fee upon herself and her children, the husband not objecting. The mortgagee afterwards applied in the bankruptcy and was there allowed to prove the whole amount of his mortgage debt against the bankrupt's estate. *Held,—*

(1) That the disclaimer of the assignees was intended only to accelerate the wife's right to redeem, if she elected so to do; but that if she elected not to redeem, and
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her bill was consequently dismissed with costs against the mortgagee, the assignees would no longer be bound by their disclaimer, their interest in the bankrupt's estate would remain unaffected by the dismissal of the bill, and they would be restored to their right to the bankrupt's life interest in the property in question.

(2) That the proof must be varied by the addition of directions that in the event of the Plaintiff's bill being dismissed with costs the life estate of the bankrupt which had been transferred to the assignees in bankruptcy, should be sold, the proceeds deducted from the amount of debt proved, and proof admitted only for the residue; but in the event of the Plaintiff redeeming the mortgage in the manner expressed in the decree, that the proof should be admitted without prejudice to any question as to the right to expunge the same either wholly or partially, or to keep the same alive for the benefit of the person paying the debt to the mortgagee. *Ex parte Paine, In re Gleaves.* Page 238

See INTEREST.

NEUTRAL.

See BLOCKADE.

NOTICE.

See ORDER AND DISPOSITION.

NOTICE OF MOTION.

See EVIDENCE, 1.

OFFENCE.

See MISDEMEANOR.

OFFICIAL ASSIGNEES.

See COSTS, 3.

ORDER AND DISPOSITION.

The object of the Joint Stock Companies Act, 1856, s. 19, was that the company itself should not be bound by any trust, and that no notice should have any effect as against the company, but there is nothing in the Act which precludes an equitable mortgage of shares in a company, or renders an equitable mortgagee incapable of perfecting his title as against the mortgagor and his assignees in bankruptcy by giving notice of the mortgage to the company.

The managing director, who was also the sole secretary of a company registered under the above Act, joined with all his co-directors in making an equitable mortgage of their shares to a bank, as a security for an advance to the company. The bank gave no notice to the company. On the bankruptcy of the managing director:—*Held*, that his shares were not in his order and disposition with the consent of the bank as the true owners thereof, but that the bank were entitled to

them as mortgagees. *Ex parte Stewart, In re Shelley.* Page 299

ORDER OF DISCHARGE.

See DISCHARGE.

ORDER WHEN MADE.

See APPEAL.

PARTNERSHIP.

1. A power given to an individual of nominating himself or any other person a partner in a business does not constitute him a partner.

An agreement was entered into between *A.* and *B.*, whereby in effect *A.* was to carry on a certain business in the name of "*A. & Co.*" for the benefit of himself and any person whom *B.* might at any time within eight years nominate: *B.* was to make certain advances to *A.* for the purpose of the business and become surety for him to a certain company: *A.* was to give *B.* promissory notes for his advances and any sums he might pay as surety, and to carry on the business in partnership with *B.*'s nominee for twenty-one years on certain specified terms: the profits of the business were to be for the first eight years applied in paying *A.* 100*l.* a-year, and then in paying *B.* his advances with interest; and the residue was to be divided between *A.* and *B.*'s nominee in certain specified proportions, and losses were to be borne in the same proportions. The agreement gave *B.* a right to see the

accounts relating to the business, and contained other special clauses under which *B.* might at any time within the eight years have nominated himself as a partner. Before the eight years had elapsed, and before any nomination had been made by *B.*, *A.* became bankrupt, being indebted to *B.* for advances. There being no person who claimed to be a joint creditor of *A.* and *B.*:—*Held*, that *B.*'s executor was entitled to prove against *A.*'s estate for the advances, the agreement not having constituted *A.* and *B.* partners as between themselves. *Ex parte Davis, In re Harris.* Page 279

2. The Court refused to relax the rule in bankruptcy that on the bankruptcy of a firm there cannot be a proof on behalf of the estate of one partner against the estate of another until all the joint debts are paid, although, in the circumstances of the case, and having regard to the amounts of the estates, the result of relaxing the rule would have been to increase the proving estate to such an extent that it would have yielded a larger surplus to the joint estate than would arise from the estate sought to be proved against if the rule were observed and the proof excluded.

The rule in question enures for the benefit of the separate creditors as well as of the joint creditors. *Ex parte Collinge, In re Holdsworth.* 289

3. A firm of two became bankrupt,

one partner being indebted to the other. The debt arose from a contract apart from the co-partnership, and was in existence at the time of the adjudication. It was admitted that there could not be any surplus of the debtor-partner's estate for the joint creditors, whether the debt was allowed to be proved against that estate by the creditor-partner or not:—

Held, to be a proper case for relaxing the general rule, and that the creditor-partner might prove against the debtor-partner's estate, and it was so ordered with a declaration that the proof must be subject to be expunged, and the dividend refunded, if any surplus of the debtor-partner's estate should arise for the benefit of the joint creditors. *Ex parte Topping, In re Levey.* Page 307

4. Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it. In that case authority by virtue of

the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud.

The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so.

Where the bankers of an individual member of a firm, knowing that the firm banked elsewhere, received from and discounted for their customer bills of exchange, purporting to be drawn and indorsed by the firm and also indorsed by the customer, the signatures of the firm as drawers and indorsers and of the customer as indorser, as well as the whole of the bills, with the exception of the signatures of the acceptors, being in the customer's handwriting:—*Held*, that the transaction showed on its face a conversion by the customer of partnership property to his own purposes; that the bankers had been

guilty of great negligence in abstaining from inquiry; and that they could only claim as against the customer's co-partners so far as the customer himself might have claimed compensation from them in respect of moneys paid by him out of his private account for partnership purposes. *Ex parte The Darlington and District Joint Stock Banking Company, In re Riches and Marshall's Trust Deed.* Page 321

See ARRANGING DEBTOR, 5.

FRAUDULENT DEED.

INTEREST.

PETITIONING CREDITOR.

See COSTS, 4.

PROCLAMATION.

See BLOCKADE.

PROOF.

The 153rd section of the Act of 1861, providing for the admission of a proof when a bankrupt is, at the date of the adjudication, liable to a demand in the nature of damages which are unliquidated, only applies to cases in which the cause of action is complete before the adjudication. *Ex parte Mendel, In re Moor's Assignment.*

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See INTEREST.

MORTGAGE.

PARTNERSHIP.

PROSECUTION.

See MISDEMEANOR.

PROTECTION FROM ARREST.

See ARRANGING DEBTOR, 2, 6.

PUBLIC COMPANY.

See CONTRIBUTORY.

ORDER AND DISPOSITION.

SET-OFF.

QUALIFICATION.

See CONTRIBUTORY, 1.

REDEMPTION.

See MORTGAGE.

REFUNDING DIVIDEND.

See INTEREST.

REGISTRATION.

1. The certificate of registration of a deed of arrangement with creditors under the 192nd section of the Bankruptcy Act, 1861, is only *primâ facie* evidence of the fulfilment of the requisites of that section to which the certificate extends, and may be controverted without a separate proceeding to set it aside. *Ex parte Page, In re Neal.* Page 59
2. The Court of Bankruptcy has no power to dispense with the execution of a deed intended for registration under the Bankruptcy Act, 1861, s. 192, by one out of several trustees appointed by the deed. A deed imperfect in that respect does not fulfil the statutory requirements of the section and can-

not be registered thereunder. *Ex parte King, In re King's Trust Deed.* Page 185

3. The 194th section of the Bankruptcy Act, 1861, gives no jurisdiction to the Court of Bankruptcy to dispense with the fourth condition of the 192nd section requiring registration of a deed intended to bind a non-assenting minority of creditors within twenty-eight days from its execution by the debtor or to extend the time therein mentioned. *In re Skinner.* 176
See ACT OF BANKRUPTCY.

ARRANGING DEBTOR, 1, 2, 4.
EVIDENCE, 3.

REPUTED OWNERSHIP.

See ORDER AND DISPOSITION.

RESOLUTION.

See COSTS, 2.

RUNNING BLOCKADE.

See BLOCKADE.

SCOTLAND.

See ANNULING, 2.

SECURED CREDITORS.

Goods were contracted to be sold, with a condition that they should not be delivered unless the vendors chose, or the goods were required by the purchaser for the actual purposes of his business, until pay-

ment of a bill of exchange, which was given by the purchaser for the full value of the goods. The bill of exchange having been dishonoured and the goods nearly all remaining undelivered, the purchaser executed a trust deed under sect. 192 of the Bankruptcy Act, 1861, and the vendors assented thereto for a sum which included the value of goods contracted to be sold:—*Held*, that upon the facts of the case the contract for sale and purchase was absolute and not conditional, and that the retention of the goods was to operate as a security for the payment of the bill of exchange, and that the vendors could if they chose assent to the deed for an amount of which the sum so secured formed part.

Semble, however, that by so assenting they forfeited their security. *Ex parte Middleton, In re Middleton.* Page 139

See ARRANGING DEBTOR, 6, 7.

SET-OFF.

A surety for a debt of a joint stock company, paid the debt after the date of an order for winding up the company, under the Joint Stock Companies Acts, 1856 and 1857. Among the securities for the debt in the hands of the creditor, was a promissory note of the company:—*Held*, that the surety was entitled to set off against a debt due from him to the company an equal amount of the money due from the company on the promissory note.

A contributory of a joint stock company (which was being wound up under the Acts of 1856 and 1857), in respect of shares purchased in his name by another:—*Held*, not entitled to set off against demand of the company the amount due from the company upon its promissory notes made in favour of the person who was the real purchaser of the shares, and who had after the date of the winding-up order indorsed and deposited the notes with the nominal purchaser's solicitors as an indemnity in respect of his liability on the shares. *In re The Moseley Green Coal and Coke Company Limited. Barrett's Case* (No. 2).

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SHAREHOLDERS.

See CONTRIBUTORY, 2.

SHARES.

See CONTRIBUTORY, 1.

ORDER AND DISPOSITION.

SHIP.

See BLOCKADE.

STAMP.

See EVIDENCE, 3.

STATUTE.

See BUILDING ACTS.

STATUTE OF LIMITATIONS.

A debtor executed a deed of inspektorship which was intended to operate under the Bankruptcy Act, 1861, s. 192, and which pro-

vided for payment of the debts by instalments, and the avoidance of the deed in certain contingencies, one of which happened, and for the revivor of the debts in that event, deducting dividends received under the deed. A certain creditor was mentioned as such in one of the schedules to the deed. The debt of this creditor was also mentioned in the statutory account of debts of the debtor, which was verified by his affidavit; and the creditor received a dividend on his debt from the inspectors under the inspektorship:—*Held*, that the debt, being otherwise barred by the Statute of Limitations, was not by any of these circumstances taken out of the operation of the statute. *Ex parte Topping, In re Levey*.

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SUFFICIENCY.

See MISDEMEANOR.

SUMMONS.

See EXAMINATION, 1.

SURETY.

See SET-OFF.

TIME.

See APPEAL.

TRADE FIXTURES.

See BUILDING ACTS.

TRUST DEED.*See* ALLOWANCE.ARRANGING DEBTOR, 4, 5, 6, 7,
8, 9, 10.

COSTS.

EVIDENCE, 2, 3.

EXAMINATION.

FRAUD ON ACT OF PARLIA-
MENT.

MAJORITY.

REGISTRATION.

SECURED CREDITORS.

UNLIQUIDATED DAMAGES.*See* PROOF.**UNREASONABLE PROVI-
SIONS.***See* ARRANGING DEBTOR, 3, 7.**ULTRA VIRES.***See* CONTRIBUTORY, 2.

VENDOR AND PURCHASER.*See* SECURED CREDITORS.

WINDING-UP.*See* CONTRIBUTORY.

SET-OFF.

WITNESS.*See* EXAMINATION.

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